Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the Georgia Court of Appeals' defiance of this Court's prior GVR order (which called for a *de novo* due-process review of a $257 million punitive damages verdict), summary reversal is appropriate.

2. Whether, in the alternative, this Court should set this case for plenary consideration of the court of appeals' application of the guidepost analysis of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and, specifically, of two issues that are subject to conflicting authority:

   (a) whether, under *BMW*'s third guidepost, courts may consider not only statutes providing for penalties in fixed amounts but also statutes calling for treble damages; and

   (b) whether, under that same guidepost, courts must consider not only statutory penalties but also punitive damages awards.

3. Whether the Court should grant, vacate, and remand for further consideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (U.S. argued Dec. 11, 2002).

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc., and Six Flags Over Georgia, Inc., were defendants and appellants in the proceedings below.

Respondents Six Flags Over Georgia LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee for the Six Flags Claims Trust, were plaintiffs and appellees in the proceedings below.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is indirectly held by Comcast Corp., a publicly held company.

Six Flags Entertainment Corporation is currently known as Six Flags Operations Inc. but for the sake of simplicity will herein be called Six Flags Entertainment Corporation (as it was by the courts below). Six Flags Operations Inc. is wholly owned by Six Flags, Inc. (formerly known as Premier Parks Inc.), a publicly held company. Six Flags, Inc., has no parent company, and no publicly held company owns 10 percent or more of its stock.

Six Flags Theme Parks Inc. is wholly owned by Six Flags Operations Inc.

Six Flags Over Georgia, Inc., is wholly owned by Six Flags, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc., and Six Flags Over Georgia, Inc., respectfully petition for a writ of certiorari to the Georgia Court of Appeals.

This is another case involving big out-of-state companies (as the lower court put it, "corporate entities with collective assets measured in billions of dollars," Pet. App. 15a) getting hit with an outsized punitive damages award in state court, here $257 million.[1] The ostensible justification for that award was to punish petitioners for non-violent conduct (a supposed breach of fiduciary duties between

[1] Because Georgia law provides for a statutory interest rate of 12 percent (well above the market rate), *see* O.C.G.A. § 7-4-12, the award now — four years later — stands at more than $380 million. At more than $84,000 per day, petitioners are paying a steep price for their belief in the correctness of their due process arguments.

business partners) that caused only economic harm. Respondents are sophisticated investors who realized a 100-fold return on their investment, but claim that petitioners should have been able to earn them even more.

This case thus epitomizes "punitive damages . . . run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (internal quotation marks omitted). It is part of the recent epidemic of state-court decisions that, by arbitrarily redistributing senseless amounts of wealth from out-of-state companies to local interests, undermine respect for the rule of law. In that sense, it is just like *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) ($2 million award for failure to inform buyer that car had been repainted), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (U.S. Mar. 6, 2002) ($145 million award for failure to settle within limits of $50,000 insurance policy).

What makes this case special even within that category of cases is that this case passed through this Court once before. On that previous occasion, this Court first issued a stay and then granted, vacated, and remanded ("GVR'd") for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In *Cooper*, the Court had held that appellate courts must subject punitive damages awards to a *de novo BMW* review and had re-emphasized the exacting nature of that review.

On remand, however, the Georgia Court of Appeals proceeded to defy this Court's directives. The court of appeals denounced this Court's punitive damages jurisprudence as a "br[eak] with common law tradition" and a "dangerous development." Pet. App. 7a, 8a. Next, the court of appeals held that petitioners had somehow waived the federal claims that were the subject of the GVR — even though it had not noted any waiver obstacle when

the case was before it the first time. As an alternative reason for defeating petitioners' federal claims, the court of appeals also purported to conduct an abbreviated excessiveness review that reduced *BMW* to a nullity. Despite the court of appeals' defiance, the Georgia Supreme Court (over the dissent of two justices) declined to intervene.

The case has therefore regrettably returned here. This Court should summarily reverse, rule that petitioners' is simply not the kind of conduct that could justify a $257 million fine, and remand for a determination of the constitutionally permissible amount. In the alternative, the Court should set the case for argument, both to address the court of appeals' application of the three *BMW* guideposts and to resolve two conflicts of authority that have arisen under *BMW*'s third guidepost. At a minimum, the Court should GVR in light of *State Farm*.

OPINION BELOW

The remand opinion of the Georgia Court of Appeals (Pet. App. 1a-16a) is reported at 563 S.E.2d 178. The prior opinion of the Georgia Court of Appeals (Pet. App. 21a-57a) is reported at 537 S.E.2d 397.

JURISDICTION

The Georgia Court of Appeals entered its judgment on remand from this Court on March 29, 2002. Pet. App. 1a. The Georgia Supreme Court denied a petition for a writ of certiorari on September 16, 2002, *id.* at 17a, and denied a motion for reconsideration on October 11, 2002, *id.* at 18a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall

. . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT

1. This case involves a business dispute between partners in a limited partnership formed in 1967 to run the Six Flags amusement park near Atlanta, Georgia. *See* Pet. App. 23a-24a. Respondents are the limited partner (itself a partnership of wealthy investors) and certain related parties. Petitioners are the general partner and the companies that were its corporate parents at the time of the relevant events.[2] Under the partnership agreement, the limited partner would contribute an initial investment, and the general partner was to manage and operate the park. Although the partnership was designed as a tax shelter for the limited partners, it turned out to be fabulously successful as an investment: respondents saw the value of their initial contribution multiply 100-fold to more than $300 million by the time this case arose, and received cash distributions of almost $600 million along the way. *See id.* at 62a.

The partnership agreement granted the general partner "exclusive control of the management of the business and affairs of the limited partnership," *id.* at 23a, including the responsibility for determining how much of each year's revenue to re-invest in capital improvements (*e.g.*, new rides and other attractions). The agreement required the

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[2] In most of the relevant time period, applicant Time Warner owned about half the stock in Six Flags Entertainment Corporation, which owned all the stock in Six Flags Theme Parks Inc. (the holding company for all seven Six Flags theme parks in the United States), which in turn owned all the stock in the general partner in the Georgia park, Six Flags Over Georgia, Inc. *See* Pet. App. 23a. In 1998, Time Warner sold its interests in all Six Flags entities to a third party, *see id.* at 28a, but retained the liability here at issue.

general partner to make "minimum capital improvements" of $800,000 each year. *Id.*[3] It contained no provisions requiring the general partner to invest more than that, or generally to maximize the park's profits. Such duties would have run counter to the partnership's purpose as a tax shelter, the text of the $800,000 capital improvements clause, and the language and purpose of another clause, which required the general partner to keep the park open each season only long enough to earn the limited partner a $2.1 million distribution.

The partnership agreement was set to expire in 1997. *See id.* at 23a. At that time, ownership of the entire park would revert to the limited partner, and the limited partner could either sell it or find a new general partner. *See id.* In 1996, the limited partner invited a number of theme-park-management companies, including the incumbent general partner (one of the petitioners here), to vie for the right to become the new general partner. Ultimately, the limited partner selected the incumbent, and the parties signed a new 30-year agreement. *See id.* at 28a. As part of the deal, respondents received about $300 million in value, *see id.* at 53a, which, in a contemporaneous document, respondents characterized as a "grand slam plus," *id.* at 64a.

2. After the agreement was signed, respondents claimed in a lawsuit in Georgia state court that the general partner, aided and abetted by its corporate parents, had for years

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[3] The relevant clause required the general partner "to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately pr[e]ceding calendar year (after deducting therefrom the amount of any sums loaned to the limited partnership during such immediately preceding calendar year) or $800,000." Pet. App. 37a n.5.

breached its fiduciary duties. *See id.* at 22a & n.2, 28a. According to respondents, the general partner — the same entity that they had just made their fiduciary for another 30 years — had purposely mismanaged the park between 1992 and 1997. In particular, respondents claimed, petitioners had purposely delayed from 1995 to 1997 the installation of a popular roller coaster called "Batman the Ride." Respondents claimed that installing the ride (which cost about $9 million) would have boosted profits by $12 million per year. *See id.* at 29a-31a. In addition, respondents claimed, the general partner had engaged in certain financial improprieties that harmed the partnership.[4]

As a result of petitioners' conduct, respondents alleged, they had suffered injury of hundreds of millions of dollars. This was so, they argued, because theme parks are usually bought and sold at about 12 times the previous year's profits. *See id.* at 28a-30a. Thus, respondents argued, if petitioners had managed the park properly (and had installed the Batman ride), the 1997 profits would have been $12 million higher, so that respondents would have received 12 times $12 million (or $144 million) more in the 1997 deal. *See id.* at 31a, 53a-54a. Respondents also claimed that petitioners owed the partnership another $50

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[4] In particular, respondents claimed that Time Warner had received a $20 million fee from Coca-Cola (for a promise to sell only Coca-Cola beverages at all Six Flags parks nationwide) without giving the Georgia partnership its share (about $3 million) at the time it was received. *See* Pet. App. 24a, 32a, 54a. Respondents also claimed that petitioners had overcharged the partnership for $4 million in corporate overhead expenses. *See id.* at 31a-32a, 54a. Finally, respondents charged that petitioners had sold the partnership a roller-coaster named "Viper" for $1 million more than it was worth. *See id.* at 27a, 32a, 54a. Based on these allegations, respondents asserted a conversion claim in addition to their breach of fiduciary duty claim, but the jury returned a verdict for petitioners on the conversion claim. *See id.* at 22a n.2.

million, on the theory that petitioners had invested the few million of supposedly misappropriated Coca-Cola funds in opportunities that proved lucrative, and that respondents were entitled to a constructive trust on the profits. *See* Pet. App. 52a n.6, 54a.

Petitioners disputed that the general partner had under-invested in the park, and demonstrated that it had postponed installing "Batman the Ride" because it feared (correctly, as it turned out) that the 1996 Olympics would draw crowds away from the park. *See id.* at 27a, 63a-64a. Petitioners argued that, in light of the partnership agreement's express language (including the clauses requiring an investment of only $800,000 annually and authorizing the general partner to close the park after earning a fixed amount) and its underlying purpose to create a tax shelter, the law could not impose an amorphous duty to maximize the park's profits through maximum capital investment under the rubric of "fiduciary duty" law. And it was undisputed that the general partner had easily satisfied its contractual duty to invest $800,000 per year. *See id.* at 40a-41a, 63a-64a.

After a trial in which the court refused to admit much of the relevant evidence proffered by petitioners,[5] the jury returned a verdict for the plaintiffs in December 1998. It awarded about $149 million to the limited partner in connection with the capital-improvements claim and about

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[5] For example, the trial court suppressed evidence that the parties' purpose in entering the partnership was to create a tax shelter — on the theory that it might prejudicially draw the jury's attention to respondents' wealth. *See* Pet. App. 43a. And, as punishment for a supposed discovery violation, the trial court refused to permit petitioners to adduce evidence that plainly showed that the supposedly misappropriated funds were not invested in the lucrative ventures to which respondents pointed. *See id.* at 45a-47a.

$48 million to the partnership in connection with both the capital improvements claim and the financial improprieties claims — for a total of more than $197 million in compensatory damages. *See* Pet. App. 22a. The jury then added another $257 million in punitive damages. *See id.* at 22a & n.3. Only $1 million of that sum was awarded against the general partner, the entity in privity with respondents; the remaining $256 million was awarded against the general partner's corporate parents, including $245 million against Time Warner. *See id.* The punitive award was more than 30 times greater than the next-largest punitive award that had been affirmed on appeal in Georgia. *See id.* at 68a.

Nevertheless, the trial court refused to set the verdict aside. In particular, the trial court rejected petitioners' argument that the punitive damages award was so excessive as to violate petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In its sole comment addressing punitive damages, the trial court stated that "the awards of compensatory and punitive damages, both separately and collectively are not so clearly excessive as to be inconsistent with the preponderance of the evidence." Order on Defendants' Amended Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial at 3 (Apr. 22, 1999). The trial court did not further elaborate.

3. The Georgia Court of Appeals affirmed the trial court's rulings in all respects, finding each of petitioners' appellate arguments to be meritless, to have been waived, to involve harmless error, or, in many cases, all three. *See* Pet. App. 21a-56a. According to the court of appeals, the $800,000 in the agreement was merely a *minimum* investment amount. *See* Pet. App. 37a-38a. Because Georgia law imposed a fiduciary duty to treat one's partners in the "utmost good faith," *id.* at 33a, 39a-40a,

the court held, the jury was entitled to find that the general partner was under "a duty to maximize the performance" of the park, *id.* at 40a, and thus was required to invest more. The court of appeals was not disturbed by the imposition of liability on the general partner's corporate parents. Although the court acknowledged that Georgia case law had "never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty," *id.* at 34a, the court held that such a cause of action had been "implicit" in Georgia law, *id.* at 35a. And, although petitioners had argued that the punitive damages award was grossly excessive in violation of their federal due process rights, *see id.* at 69a-70a, the court of appeals rejected all challenges to the award, *see id.* at 55a-56a.

Despite the importance of the case and the massive amount in controversy, the Georgia Supreme Court denied certiorari without comment. Petitioners subsequently paid the compensatory award of almost $200 million (nearly $250 million with interest), but, despite Georgia's high statutory post-judgment interest rate, *see supra*, p.1 n.1, continued their efforts to overturn the punitive damages award.

4. After the court of appeals denied petitioners a stay, petitioners filed a stay request in this Court, which was granted. *See* Pet. App. 58a. Petitioners subsequently filed a petition for a writ of certiorari, asking this Court to GVR for further consideration in light of *Cooper*. In *Cooper*, the Court had held that an appellate court "should apply a *de novo* standard of review" in evaluating a trial court's *BMW* analysis. 532 U.S. at 436. *Cooper* also re-emphasized the exacting nature of the review required by *BMW*, providing detailed instructions on how reviewing courts should apply the *BMW* guideposts. *See id.* at 441-43. Respondents' brief in opposition argued that petitioners had abandoned any *Cooper* claim by failing to present it

properly to the court of appeals. Nevertheless, this Court GVR'd "for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001)." *Id.* at 59a.

5. On remand, the court of appeals reinstated its previous opinion. *See* Pet. App. 2a, 12a. The court of appeals criticized this Court's framework for reviewing punitive damages as an "imperfect . . . attempt to evaluate punitive damages," *id.* at 10a n.6, and as "avoid[ing] the application of the Seventh Amendment," *id.* at 7a. The court of appeals characterized the Court's approach as a "br[eak] with common law tradition," *id.*, and a "dangerous development," *id.* at 8a (internal quotation marks omitted). The court of appeals therefore stated that it would not adopt *Cooper* as a matter of state law: a trial court's state-law excessiveness analysis would continue to be reviewed only for abuse of discretion. *See id.* at 6a-8a.

And the court of appeals held that it was not required to apply *Cooper* even as a matter of federal law. That was so, according to the court of appeals, because petitioners had abandoned in their original appeal *any* federal due process claim. According to the court of appeals, petitioners' opening brief in the previous round had "failed to cite to any relevant facts, give record citations, or present any legal analysis supporting [the due process claim]." *Id.* at 11a. The court of appeals so held even though the brief in question contained a lengthy background section replete with facts and record citations and, in the argument section, expressly invoked *BMW* and detailed the various reasons why the verdict was excessive. *See id.* at 63a-70a.

To reach its waiver determination, however, the court first needed to eliminate another obstacle. In *Kent v. White*, 559 S.E.2d 731, 736-37 (Ga. Ct. App. 2002), a decision announced just two months earlier, a panel of the

court of appeals had held that a *Cooper* claim cannot be waived, even where an appellant's brief contains no federal claim at all. The court of appeals' solution to this problem was simply to overrule *Kent*. *See* Pet. App. 5a-6a.[6] Not a single member of the *Kent* panel dissented to protest the overruling of the two-month old precedent.

The court of appeals declined to rest solely on waiver: it went on to conduct a cursory *BMW* analysis, finding that each of the three *BMW* guideposts militated in favor of the verdict. In connection with *BMW*'s first guidepost (concerning reprehensibility), the court termed petitioners' conduct "especially reprehensible" — on the theory that their "intentional breach of [their] fiduciary duty revealed a callous indifference to the financial well-being of [their] limited partners and their individual investors." *Id.* at 12a-13a. In connection with *BMW*'s second guidepost (concerning the relationship between punitive award and actual harm), the court of appeals held that, in light of the $200 million compensatory award, there was no "shocking disparity." *Id.* at 14a (internal quotation marks omitted). Finally, in connection with *BMW*'s third guidepost (requiring a comparison to other civil fines and penalties), the court of appeals held that petitioners had been put on notice of the possibility of a large punitive damages award by state laws threatening treble damages for RICO and other crimes, which, according to the court, addressed "comparable corporate misbehavior." *Id.* at 15a-16a & n.10.

Following their defeat in the court of appeals, petitioners returned to the Georgia Supreme Court to seek a writ of certiorari. Despite the important legal issues presented, the Georgia Supreme Court — over two dissents

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[6] This is apparently why the court of appeals handed down an opinion signed by all judges. *See* O.C.G.A. § 15-3-1(c)(2).

— again denied certiorari without explanation. *See id.* at 17a. The court likewise denied reconsideration. *See id.* at 18a. Following the denial, respondents consented to a stay pending review in this Court, and filed a joint motion with the court of appeals. But even that request was denied, in an order stating that "[i]t is the general policy of this Court not to stay remittiturs on applications for Certiorari to the United States Supreme Court." *Id.* at 19a. The trial court finally agreed to postpone issuance of its judgment.

REASONS FOR GRANTING THE WRIT

I. IN LIGHT OF THE GEORGIA COURTS' REFUSAL TO FOLLOW THIS COURT'S DIRECTIVES, SUMMARY REVERSAL IS IN ORDER.

This Court previously remanded to the Georgia Court of Appeals for further consideration in light of *Cooper*. *Cooper* is the most recent in a line of cases decided over the past decade in which this Court has recognized increasingly stringent due-process limitations on punitive-damages awards in state courts.[7] Under those decisions, courts must overturn a punitive-damages award that is "grossly excessive," as judged by three guideposts: (1) "the degree of reprehensibility" of the defendant's conduct, (2) "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award," and (3) "the difference between [the punitive damages] remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 574-75. *Cooper* added that appellate courts must review lower courts' application of these guideposts *de novo*: a "thorough, independent re-

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[7] *See Cooper*, 532 U.S. 424; BMW, 517 U.S. 559; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

view" of the lower court's determination is required. 532 U.S. at 441. *Cooper* further provided important guidance concerning the practical application of the three *BMW* guideposts by correcting a lower court's analysis. *See id.* at 441-43.

A. Instead of reconsidering its prior decision in good faith, the Georgia Court of Appeals expressed its disagreement with this Court's precedents and issued a fresh decision that effectively defied this Court's directives. The court of appeals began by quarreling with this Court's punitive damages jurisprudence, which the court viewed as "avoid[ing] the application of the Seventh Amendment," Pet. App. 7a; a "br[eak] with common law tradition," *id.*; an "imperfect . . . attempt to evaluate punitive damages," *id.* at 10a n.6; and a "dangerous development," *id.* at 8a. For these reasons, the court of appeals refused to adopt *Cooper*'s reasoning as a matter of *state* law, holding that Georgia appellate courts should continue to review state-law challenges to punitive damages awards deferentially. *See id.*

Presumably for the same reasons, the court refused to conduct the *de novo* review required by federal law and dictated by this Court's GVR. According to the court of appeals, petitioners had waived any claim that the award violated federal due process when, in their court of appeals brief in the previous round of review, they "failed to cite to any relevant facts, give record citations, or present any legal analysis supporting that assertion." *Id.* at 11a.

That waiver ground is entirely imaginary. The brief in which petitioners supposedly abandoned their federal claims contained numerous pages of factual background that were replete with record citations. *See id.* at 60a-67a. No previous Georgia decisions suggest that record citations must somehow be repeated in a brief's argument section.

And any such requirement would be directly contrary to the Georgia Legislature's injunction that appellate practice rules must be "liberally construed so as to bring about a decision on the merits of every case appealed." O.C.G.A. § 5-6-30; *see also Felix v. State*, 523 S.E.2d 1, 3 (Ga. 1999) (appellate practice rules are not intended "to set traps and pitfalls by way of technicalities") (internal quotation marks omitted).

As for legal analysis, petitioners' court of appeals brief expressly stated: "The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here 'was purely economic in nature', and Defendants' conduct 'evinced no indifference to or reckless disregard for the health and safety of others'. *Id.* at 576." Pet. App. 70a. That passage was part of a three-page section (captioned "The trial court erred by failing to set aside the punitive damages award.") that also argued that the punitive damages award ran afoul of analogous principles of state law. The argumentation adduced in support of petitioners' state-law claims applied equally to the federal argument: that "[t]his case did not involve . . . fraud," *id.* at 69a; that the award was "over *30* times larger than the largest punitive damages award ever paid in this state — the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system," *id.* at 70a; that "the $257 million was awarded primarily because Defendants installed a roller coaster three years later than Plaintiffs wished," *id.*; and that "Defendants' conduct involved no 'personal injury or death' (or even a *risk* of injury or death)," *id.*

Quite apart from its facial invalidity, the court of appeals' waiver holding is remarkable for four additional reasons. *First*, the court of appeals did not invoke its

broad waiver ground when this case was before it the first time.[8] Indeed, even respondents, whose able counsel have advanced waiver arguments at every turn, never pressed the ground adopted by the court of appeals. Respondents did not argue waiver in the court of appeals the first time around, instead addressing petitioners' *BMW* argument on the merits. Similarly, respondents did not rely on the court of appeals' waiver ground in opposing review in either the Georgia Supreme Court, in this Court, or on remand in the court of appeals. To the contrary, respondents were compelled to concede "the proper presentation of some due process claims under *BMW*."[9] Indeed, even in opposing petitioners' certiorari petition in the Georgia Supreme Court, respondents could not bring themselves to defend the court of appeals' waiver holding.

Second, the court of appeals' waiver holding is suspect because, although the court of appeals held the federal excessiveness claim waived, it did not similarly hold petitioners' state common law excessiveness claim waived.

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[8] *See* Pet. App. 56a; *cf. Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133, 1136 (1997) (Scalia, J., dissenting from denial of certiorari) (particular cause for concern exists where "the grounds asserted by state courts as a basis for rejecting constitutional claims . . . are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand").

[9] Brief for Six Flags Over Georgia, LLC, *et al.* in Opposition at 18, No. 00-1875 (U.S. filed Aug. 14, 2001) ("Br. in Opp."). Respondents did advance waiver arguments, but they were different than that embraced by the court of appeals. In particular, respondents argued that petitioners had failed expressly to ask the court of appeals for the *de novo* review mandated by *Cooper*; that petitioners forfeited all constitutional arguments when they appealed to the court of appeals instead of directly to the Georgia Supreme Court; and that the "standard of review" section of petitioners' court of appeals brief invited abuse-of-discretion review. *See id.* at 12-20.

See Pet. App. 12a; 55a-56a. The court of appeals addressed the state-law claim even though it was supported by the same number of citations to record materials as petitioners' federal claim. Plainly, state courts may not "avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

Third, the court of appeals' waiver holding is dubious because of its abrupt, and unexplained, overruling of its own precedent on preservation of federal-law claims like this one. In *Kent*, the court of appeals had held — just two months before the decision in this case — that an appellant did not waive a *Cooper* claim when his brief contained no federal argument at all. *See Kent*, 559 S.E.2d at 736-37. None of the judges who had sat on the *Kent* panel explained why the reasoning found persuasive in *Kent* had lost all its attraction in the intervening 60 days.

Finally, the court of appeals' waiver holding is incompatible with this Court's GVR order. In their brief in opposition to petitioners' prior certiorari petition in this Court, respondents argued extensively that petitioners' *Cooper* argument had been waived. *See supra*, p.15 n.9. Respondents further argued that, because of the supposed waiver, this Court lacked jurisdiction. *See* Br. in Opp. at 3 ("[T]his Court lacks jurisdiction . . . because the federal questions Petitioners now raise were not presented to or decided by the Georgia Court of Appeals."). This Court nevertheless granted certiorari — presumably after considering its jurisdiction. By issuing its GVR order, then, the Court necessarily implied a determination that petitioners' *BMW* claims — of which petitioners' *Cooper* claims were merely a subset — were properly preserved. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (Court "has the power to remand to a lower federal court any case

raising a federal issue *that is properly before [it]*") (emphasis added).

For all these reasons, the court of appeals' waiver ruling does not constitute an adequate and independent state ground: it does not reflect a procedural rule that is applied consistently and impartially.[10] To the contrary, the court of appeals' reliance on a facially meritless waiver ground, together with its express antagonism to this Court's punitive damages jurisprudence, suggests that its holding was a pretext to camouflage defiance of this Court's directives.

B. The court of appeals' unwillingness to follow this Court's instructions is further evident from its facially insufficient *BMW* analysis. As for *BMW*'s first guidepost, the court of appeals' characterization of petitioners' conduct as "especially reprehensible" is strained. There was no violent conduct or bodily harm in this case — only financial injury. The conduct alleged (the supposed breach of fiduciary duty consisting of a failure to earn respondents even more than the 100-fold return they did realize) was barely even tortious: it would not have been but for the

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[10] *See, e.g., Ford v. Georgia*, 498 U.S. 411, 424 (1991) ("The Supreme Court of Georgia's application of [waiver] to the case before us does not even remotely satisfy the requirement . . . that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been firmly established and regularly followed by the time as of which it is to be applied.") (internal quotation marks omitted); *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.") (internal quotation and brackets marks omitted); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("state procedural requirements which are not strictly or regularly followed cannot deprive [the Court] of the right to review").

"partnership" label on the parties' business agreement.[11] Moreover, even assuming the court of appeals was correct in rejecting petitioners' reading of the partnership agreement as expressly permitting them to limit annual investment to $800,000, that reading was certainly reasonable.[12] Likewise, the corporate parents had no reason to

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[11] *See ServiceMaster Co. v. Martin*, 556 S.E.2d 517, 521-23 (Ga. Ct. App. 2001) (no punitive damages allowed in connection with claim for breach of good-faith-and-fair-dealing duty). Indeed, even in a contract captioned "partnership agreement," parties can eliminate any fiduciary duties that might otherwise exist by inserting a single sentence to that effect. *See, e.g., Westminster Properties, Inc. v. Atlanta Assocs.*, 301 S.E.2d 636, 638 (Ga. 1983) ("as between partners the intent of the parties is the true test, and a partnership may be created by a contract giving rights or imposing obligations differing from those which the law ordinarily infers"). That is of course precisely what the parties intended to accomplish in the $800,000 clause.

[12] *See, e.g., Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, No. 372, 2001, 2002 WL 31303135, at *5 (Del. Aug. 29, 2002) ("only in situations where the partners have not expressly made provisions in their partnership agreement" will courts "look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence") (internal quotation marks omitted); *Wilmington Leasing, Inc. v. Parrish Leasing Co.*, Civil Action No. 15202, 1996 WL 752364, at *14 (Del. Ch. Dec. 23, 1996) ("Where, as here, a partnership agreement specifically addresses the rights and duties of the partners, any fiduciary duty that might be owed by the . . . Partners is satisfied by compliance with the applicable provisions of the partnership agreement."); *see also In re Cencom Cable Income Partners, L.P. Litig.*, No. 14634, 1997 WL 666970, at *4 (Del. Ch. Oct. 15, 1997) ("Plaintiffs have failed to show why the written terms of the [partnership agreement] should be subject to some court-approved, after-the-fact, moralistic 'entirely fair' standard, when the parties defined the desired process in the Partnership Agreement and could have, but did not, require the General Partner to include the specific provisions that [expert witness] testified would be desirable in a purchase agreement negotiated at arms-length.").

suspect that they might be held liable: as the court of appeals conceded, it "ha[d] never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty." Pet. App. 34a. And the supposed victims of petitioners' conduct were sophisticated investors who were advised by the Goldman Sachs investment bank and the Gibson Dunn law firm. *See id.* at 64a. When, under these circumstances, the Georgia Court of Appeals manages to find "especially reprehensible" conduct meriting a quarter-billion-dollar fine (on the theory that it "revealed a callous indifference to the financial well-being of [the] limited partners," *id.* at 12a-13a), one ought to worry about the punitive award the court of appeals might approve in a case involving, say, a pattern of knowing safety violations resulting in bodily harm to helpless victims.

As for the second guidepost (concerning the relationship between punitive damages and harm), the court of appeals said only that "the ratio of compensatory to punitive damages is 1-to-1.3," and that it saw "no 'shocking disparity' inherent in this figure." Pet. App. 14a. The court of appeals did not address any of petitioners' arguments concerning this guidepost. Thus, the court ignored that, where there is a large compensatory award (here, almost $200 million), a lower punitive-to-compensatory ratio is required.[13] The court of appeals further ignored

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[13] *See BMW*, 517 U.S. at 582 ("low awards of compensatory damages may properly support a higher ratio than high compensatory awards"); *Inter Medical Supplies, Ltd. v. EBI Medical Sys., Inc.*, 181 F.3d 446, 467-68 (3d Cir. 1999) ("[H]igh, easily calculable compensatory damages may more appropriately be accompanied by a lower punitive damages ratio."); *Continental Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641-42 (10th Cir. 1996) ("[I]n commercial litigation like that before us the actual and potential damages are likely to be substantial, and thus punitive damages awarded on even a modest multiplier generally will be enough to gain the defendant's attention

that a lower ratio is called for when the compensatory award already has a deterrent effect.[14] That was plainly true here: the compensatory award of almost $200 million went well beyond disgorgement of any gain petitioners could conceivably have received because of their conduct. In particular, respondents have never explained how the installation of a $9 million ride could somehow increase the value of the Six Flags park by $150 million overnight.[15]

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and alter its future behavior."); *Earnest v. Truck Insurance Exchange*, No. G027505, 2002 WL 31689728, at *17 (Cal. Ct. App. Nov. 26, 2002) ("relatively high compensatory damage award calls for a lower ratio between compensatory and punitive damages than a low compensatory award where, for example, a particularly egregious act has resulted in only a small amount of economic damages") (internal quotation marks omitted).

[14] As one federal court of appeals noted, "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only' $10,005 and he was not otherwise punished." *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001). . In such cases, a defendant would "reasonably, were there no punishment, be deterred . . . by its actual expenses." *Id.*; *see also Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987) ("The large compensatory damage award [$300,000], by itself, provides significant deterrence, even to employers as large as Anheuser-Busch.").

[15] Assuming that, as respondents charged, petitioners had short-changed the park by one ride, any rational bidder in a sale of the park would have recognized that profits in prior years had been lower than they should have been, and would therefore have based his bid on an estimate of profits that would have been earned with one additional ride (minus the cost of that ride). Respondents' "multiplier" theory is therefore utterly "unrealistic." *Cooper*, 532 U.S. at 442; *see also Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting) ("The ratio should not be determined by measuring the punitive damages award against the unproved compensatory damages awarded by the same 'runaway' jury that rendered the punitive damages verdict but against the *actual* damages proven by the evidence.").

The court of appeals similarly wrecked *BMW*'s third guidepost, which requires a comparison to other sanctions. The court of appeals did not identify any Georgia statute threatening a penalty for a breach of fiduciary duty among partners. It could not have, because none exists. Instead, the court relied on statutes addressing altogether disparate conduct (*e.g.*, the state RICO statute) on the theory that those statutes addressed "generally corrupt corporate behavior." Pet. App. 15a. But, if that remote degree of similarity were enough, the third guidepost — indeed, all of *BMW* — would be a nullity.

D. The Georgia Supreme Court's rules require it to hear "cases of great concern, gravity, or importance to the public." Ga. Sup. Ct. Rule 40. Given the court of appeals' defiance of a United States Supreme Court order, the enormity of the $257 million punitive award, and the important due process principles at stake, one might have expected the Georgia Supreme Court to have considered itself duty-bound to review the court of appeals' judgment, thereby obviating any need for this Court to allocate scarce resources to that end. But the Georgia Supreme Court denied certiorari without comment, just as it had before.

Regrettably, then, it falls to this Court to address defiance of federal law by Georgia's intermediate appellate court. In light of the court of appeals' defiance, summary reversal is appropriate.[16] The Court should rule that, as a

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[16] *See, e.g.*, *Powell v. Texas*, 492 U.S. 680, 681 (1989) (per curiam) (summarily reversing where, on remand from GVR, state court reinstated its prior decision on waiver rationale); *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (per curiam) (summarily reversing decision on remand from GVR where court of appeals had "misapprehended our holding"); *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam) (summarily reversing where court of appeals distinguished decision in light of which case had been GVR'd in a way that was "unpersuasive"); *Hutto v. Davis*, 454 U.S. 370, 374-75

matter of federal due process, the conduct for which petitioners were held liable simply cannot support a punitive damages award of $257 million. With that correction, the Court can remand to the Georgia courts for a *de novo* determination of the maximum amount permitted. *Cf. BMW*, 517 U.S. at 585-86; *Cooper*, 532 U.S. at 443.

II. IN THE ALTERNATIVE, PLENARY CONSIDERATION IS APPROPRIATE TO REVIEW THE COURT OF APPEALS' *BMW* ANALYSIS.

If the Court is not inclined to reverse summarily, the same grounds relied on above also militate in favor of plenary review: the Court should grant certiorari to review whether the Georgia Court of Appeals properly followed this Court's directive to conduct a *de novo* review of the punitive award's constitutionality.[17] Plenary review would also allow the Court to address conflicts of authority

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(1982) (per curiam) (summarily reversing court of appeals' decision on remand from GVR where "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress"); *Fontaine v. California*, 390 U.S. 593, 595 (1968) (per curiam) (summarily reversing where, after GVR, intermediate state appellate court reinstated its decision on harmless-error grounds); *see also Williams*, 520 U.S. at 1134 (Scalia, J., dissenting from denial of certiorari) ("I think it important to the dignity of this Court and the integrity of its processes to set aside what can only be regarded as an intentional evasion of its decrees. I would grant the petition for certiorari, summarily reverse the judgment of the Supreme Court of California, and remand for further proceedings.").

[17] *See, e.g., Ford v. Georgia*, 498 U.S. 411 (1991) (on plenary review, reversing where Georgia Supreme Court had invented waiver ground to avoid application of precedent for whose consideration this Court had GVR'd); *Yates v. Aiken*, 484 U.S. 211, 214 (1988) ("We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our [GVR] mandate.").

concerning two questions that have arisen under *BMW*'s third guidepost.

First, *BMW* recognizes that, where particular conduct is punishable only by small statutory fines, a defendant lacks "fair notice" that it might be subject to "a multimillion dollar penalty." *BMW*, 517 U.S. at 584. Treble-damages statutes similarly cannot provide fair notice of the potential of a large punitive award. As this case illustrates, the vagaries of jury trials can cause compensatory damages to balloon, particularly when applicable law does not limit compensatory damages to foreseeable injury.[18] Thus, courts have generally reserved their treatment of treble damages statutes for the ratio guidepost.[19] Yet, the court of appeals held that Georgia's RICO statute put petitioners on notice of punishment up to $600 million — three times the unrealistic compensatory award in this case. *See* Pet. App. 15a.[20] The issue is particularly significant because numerous States have treble-damages statute that, on the reading adopted below, would in many cases render the

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[18] *See generally Restatement (Second) of Torts* § 435(1) (1965) ("[T]he fact that the actor neither foresaw nor should have foreseen the extent of the harm . . . does not prevent him from being liable.").

[19] *See, e.g., Clark v. Metropolitan Health Found., Inc.*, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000) (citing *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1287 (7th Cir. 1995)); *EEOC v. CEC Entm't, Inc.*, No. 98-C-698-X, 2000 WL 1339288, at *19 (W.D. Wis. Mar. 14, 2000). Indeed, in considering the Alabama Deceptive Trade Practices Act relevant in *BMW*, this Court placed weight only on its fixed penalty, even though the statute was also punishable by treble damages. *See BMW*, 517 U.S. at 584; *see also* Ala. Code §§ 8-19-11(b) ($2,000 fine), 8-19-10(a)(2) (treble damages).

[20] *See also Ford Motor Co. v. Sperau*, 708 So.2d 111, 121-22 (Ala. 1997) (relying on same treble-damages statute that this Court left aside in *BMW*).

third guidepost a meaningless repetition of the second ('ratio') guidepost.

Second, the court of appeals also erred in declining to consider the absence of any punitive damages awards in prior cases even approaching the size of that here. When awards in prior cases have been small, a large award raises concerns of "fair notice," *BMW*, 517 U.S. at 584, and risks denial of "'the uniform treatment of similarly situated persons that is the essence of the law itself,'" *Cooper*, 532 U.S. at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). If, as many courts have held, large prior awards can help sustain a large award,[21] then the absence of large prior awards equally militates against a large award.[22] Yet, the Georgia Court of Appeals held that it need not consider punitive damages awards in other cases.

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[21] *See, e.g., Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers*, No. 2001-CA-000152-MR, 2002 WL 31045356, at *8 (Ky. App. Sept. 13, 2002); *Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 284-85 (Alaska 2002); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 47 (Tex. 1998).

[22] *See, e.g., Earnest v. Truck Insurance Exchange*, No. G027505, 2002 WL 31689728, at *17 (Cal. Ct. App. Nov. 26, 2002) ("the size of the award compared to those imposed in other bad faith cases as of 1991 is excessive; thus [defendant] could not reasonably expect the type of conduct it exhibited here to subject it to such a large award"); *EEOC v. Mid-Continent Sec. Agency, Inc.*, No. 99C5381, 2001 WL 800089, at *5 (N.D. Ill. July 12, 2001) ("To the extent that comparisons between disparate cases can provide guidance, both of these cases suggest that the jury's award of $184,000 in this case was grossly excessive."); *Komlosi v. Fudenberg*, No. 88 Civ. 1792 HBP, 2000 WL 351414, at *19 (S.D.N.Y. Mar. 31, 2000) ("A survey of the punitive damages awards in other malicious prosecution cases clearly demonstrates the excessive nature of the punitive damages awarded against defendant."); *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting) (disapproving of award that was "almost three times greater than any previously reported award of punitive damages in Kentucky").

See Pet App. 14a n.9.[23] Where courts do not perform a comparison to other punitive damages awards, the predictability and uniformity intended by *BMW* will be thwarted.

III. AT A MINIMUM, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *STATE FARM*.

If the Court is disinclined to reverse summarily or set this case for plenary argument, the Court should at a minimum first hold and then GVR in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289, just as it previously GVR'd in light of *Cooper*.

The similarities between this case and *State Farm* are striking. In *State Farm*, just as in this case, the plaintiffs based their suit on a supposed breach of a fiduciary duty: State Farm was alleged to have committed such a breach by handling an insurance claim in bad faith. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676, at *3, *13, *18 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002). The *State Farm* plaintiffs likewise won an enormous punitive damages award ($145 million) that a state court upheld in the face of a *BMW* challenge. *See id.* at *6-*18.

Just as this case, then, *State Farm* concerns the proper application of the *BMW* guideposts to outsized punitive damages awards in cases involving purely economic harm. Although *State Farm* also presents an "extraterritoriality" issue, most of the briefing in the case has centered on how the three *BMW* guideposts should be applied to the facts of

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[23] *See also Sumitomo Corp. v. Deal*, 569 S.E.2d 608, 616 (Ga. Ct. App. 2002), *cert. denied*, S02C1838, 2002 Ga. LEXIS 979 (Ga. Oct. 28, 2002).

the case.[24] More specifically, *State Farm* crisply raises the question of the level of similarity that is required between a defendant's actions and the conduct proscribed by statutes considered under the third *BMW* guidepost. According to the petitioner in *State Farm*, "the Utah Supreme Court misapplied the *BMW* analysis by including in its consideration of this guidepost penalties for a host of conduct other than the underlying conduct toward plaintiffs," including "multiple instances of various allegedly fraudulent types of conduct," and a "list of criminal offenses [that] contains no offense that could conceivably constitute comparable conduct." Brief for Petitioner at 38, 39, No. 01-1289.[25] As already explained, petitioners here assert that the Georgia Court of Appeals committed the same error.

If the claims of the *State Farm* petitioner prevail even in part, this Court's decision in *State Farm* will constitute an "intervening development[]" that "may determine the ultimate outcome of the litigation" here. *Lawrence v. Chater*, 516 U.S. at 167. A GVR will therefore be

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[24] See, e.g., Brief for Petitioner at 28-41, No. 01-1289 (U.S. filed Aug. 19, 2002); Brief for Respondent at 11-27, No. 01-1289 (U.S. filed Oct. 17, 2002); Reply Brief for Petitioner at 9-17, No. 01-1289 (U.S. filed Nov. 18, 2002).

[25] *See also* Brief of the American Tort Reform Ass'n as Amicus Curiae in Support of Petitioner at 23-25, No. 01-1289 (U.S. filed Aug. 19, 2002) (in applying the third *BMW* guidepost, "[t]he Court's invocation of [certain] statutory penalties was erroneous because, for example, there was no claim asserted in this case of a violation of the Utah RICO statute," and the court erroneously considered only maximum statutory penalties, instead of "realistically likely penalties"); Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner at 29-30, No. 01-1289 (U.S. filed Aug. 19, 2002) (arguing that the Utah Supreme Court erroneously ignored "the only readily comparable sanction," and instead "focused on hypothetical multiple penalties for alleged harm to others or [other] wildly unlikely penalties").

required. *See id.* at 167-68. A GVR could also "serv[e] as a cautious and deferential alternative to summary reversal." *Id.* at 168.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 23, 2002

APPENDIX A

In the COURT OF APPEALS OF GEORGIA
WHOLE COURT

No. A00A0120.

TIME WARNER ENTERTAINMENT CO., ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C. ET AL.

[Decided March 29, 2002]

ELLINGTON, Judge.

This is the second appearance of this case before this Court. On July 13, 2000, we affirmed the jury's award of compensatory and punitive damages to appellees Six Flags Over Georgia, L.L.C. ("Flags") and Six Flags Fund, Ltd., L.P. ("Fund"). *Time Warner Entertainment v. Six Flags Over Georgia*, 245 Ga. App. 334 (537 SE2d 397) (2000) ("Time Warner").[1] On January 18, 2001, the Supreme

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[1] "This appeal is from a jury verdict in favor of a limited partnership and its sole limited partner against the general partner which from 1991 through 1998 operated the partnership's business investment, the Six Flags Over Georgia theme park. Appellee [Flags] is the limited partnership which owns the park. Appellee [Fund] is the partnership's sole limited partner and is comprised of individual investors. Although appellant Six Flags Over Georgia, Inc. ("SFOG") was the named general partner corporate entity responsible for operating the park, appellees alleged that Time Warner Entertainment Company, L.P. ("TWE"), acting through and in concert with its subsidiaries SFOG, Six Flags Entertainment Corporation ("SFEC"),

Court of Georgia denied the petition for a writ of certiorari filed by appellants Time Warner Entertainment Company, L.P. ("TWE") and its subsidiaries Six Flags Over Georgia ("SFOG"), Six Flags Entertainment Corporation ("SFEC"), and Six Flags Theme Parks, Inc. ("SFTP"). *Time Warner*, 2001 Ga. LEXIS 98 (Ga. Jan. 18, 2001). However, on October 1, 2001, the United States Supreme Court granted certiorari, vacated our opinion, and remanded the case to us for further consideration in light of an opinion it issued on May 14, 2001, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (121 SC 1678, 149 LE2d 674) (2001) ("*Leatherman*"). *Time Warner*, ___ U.S. ___ (122 SC 24, 151 LE2d 1) (2001). Upon remand, we re-docketed this case and gave the parties an opportunity to brief and to orally argue the relevant issues.

1. *Leatherman* pertains only to our analysis of whether the award of punitive damages in this case was excessive. We addressed whether the award of punitive damages was excessive in Division 6 (c) of our original opinion. *Time Warner*, 245 Ga. App. at 356-357 (6) (c). Therefore, with the exception of Division (6) (c), we hereby reinstate our original opinion, *Time Warner*, 245 Ga. App. at 334-356.

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and Six Flags Theme Parks, Inc. ("SFTP"), assumed the role of general partner and directed the activities of the partnership. The complaint alleged, in essence, that the general partner damaged the appellees by preferring its own financial interest over that of the partnership and of the limited partner. The jury returned a verdict in favor of the appellees, awarding a total of $197,296,000 in compensatory damages and $257,000,000 in punitive damages." (Footnotes omitted.) *Time Warner*, 245 Ga. App. at 334.

2. *Review of Allegedly Excessive Punitive Damages Awards.*

(a) *The Standard of Review.*

(i) *Federal Constitutional Excessiveness Claims. Leatherman* requires state and federal appellate courts to review de novo claims that punitive damages awards are grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Leatherman*, 532 U.S. at 433-434. However, "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination [on the excessiveness issue] under an abuse of discretion standard.'" Id. at 433, citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (109 SC 2909, 106 LE2d 219) (1989); see also *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189, 1194 n.3 (8th Cir. 2001) ("Time Warner has not argued that the punitive damages award violated its right to due process which would require a de novo review of the denial of its motion [for new trial or remittitur]" under *Leatherman*.) Further, if the federal constitutional claim is not raised in the court below, such arguments on appeal are "unavailing." *Leatherman*, 532 U.S. at 433 n.7.

Because *Leatherman* applies only to excessive punitive damages claims raised under the federal constitution's due process clause, it does not reach excessiveness claims raised under state and federal common law. Thus, state and federal appellate courts remain free to review common law excessiveness claims under an abuse of discretion standard. See id.; *Foster*, 250 F3d at 1194; *Stroud v. Lints*, 760 NE2d 1176, 1180 (I) (Ind. Ct. App. 2002) (following the U.S. Supreme Court's remand for reconsideration in light of *Leatherman*, the Indiana Court of Appeals concluded that since no federal constitutional claim was raised, it

could review the common law excessiveness claim under an abuse of discretion standard.)

As one scholar quipped, judicial review of excessive punitive damages awards "now comes in both common-law and constitutional flavors." Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (Oct. 2001). Since *Leatherman*, many state and federal courts have recognized this federal due process/common law analytical split. For example, in July 2001, the Eleventh Circuit reviewed an award of both compensatory and punitive damages in a diversity action under an abuse of discretion standard. *Middlebrooks v. Hillcrest Foods*, 256 F3d 1241, 1249 (IV) (11th Cir. 2001). Applying Georgia law to the common law excessiveness claim, the Eleventh Circuit noted that de novo review under *Leatherman* was not required because the appellant failed to argue that the punitive damages award violated its constitutional rights. Id. at 1249 n. 5. Although some state appellate courts have embraced *Leatherman*'s de novo standard of review and applied it to all excessive punitive damages claims, e.g. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 432 Utah Adv.Rep.44 (2001 Utah LEXIS 170; Oct. 10, 2001), other jurisdictions have declined to extend the standard's application beyond its federal due process bounds, e.g. *Trinity Evangelical Lutheran Church v. Towers Ins. Co.*, ___ Wisc. App. ___ (2002 Wisc. App. LEXIS 129; Jan. 30, 2002): *Stroud v. Lints*, 760 NE2d 1176 (Ind. Ct. App. 2002); *State Compensation Ins. Fund v. WPS, Inc.*, ___ Cal. App. ___ (2001 Cal. App. LEXIS 1410; Oct. 22, 2001). And at least one state appellate court has flatly rejected the *Leatherman* de novo standard of review as "an appellate procedural option for the federal courts." (Citation omitted.) *Seitzinger v. Trans-Lux Corp.*, ___ N.M. App. ___ (IV) (A) (2001 N.M. App. LEXIS 116; Nov. 30, 2001; cert

granted, 2002 N.M. LEXIS 20, Jan. 15 2002). The Supreme Court of Georgia has yet to enter this fray, so we proceed with caution.

In *Kent v. A.O. White, Jr., Consulting Engineers, P.C.*, ___ Ga.App. ___ (2002 Ga. LEXIS 111; Case No. A01A-0756, decided Jan. 29, 2002), a panel of this Court assumed that the Georgia Supreme Court "sub silentio" adopted *Leatherman* with respect to all excessive punitive damages awards claims by virtue of an order remanding *Kent* to this Court. We are now convinced, however, that the remand order had no such implications. The Georgia Supreme Court's remand order in that case, like the U.S. Supreme Court's remand order in this case, was a mandate to reconsider our opinion "in light of" *Leatherman*. 2001 Ga. LEXIS 929; Nov. 30, 2001. The U.S. Supreme Court has recognized that such a "grant-vacate-remand" order ("GVR") is a deferential method of sending a case back to a lower tribunal so that it may reconsider its decision in light of an intervening legal event. See *Lawrence v. Chater*, 516 U.S. 163, 166-169 (116 SC 604, 133 LE2d 545) (1996); see also *Hoover v. Kiowah Tribe*, 986 P.2d 516, 519 (Okla. 1999) (Wilson, J., dissenting). As Justice Scalia explained, "we left it to the state court to decide the effect of the intervening event, rather than follow our usual practice of deciding that question for ourselves." *Lawrence v. Chater*, 516 U.S. at 179 (Scalia, J. dissenting.) Also, the Georgia Supreme Court, in *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 616-617 (409 SE2d 501) (1991), a punitive damages case that was "GVR'd" by the U.S. Supreme Court in light of new case law, distinguished the intervening case law and affirmed and reinstated its previous decision. Implicitly then, if a higher court remands a case to a lower court to decide an issue for itself, it logically follows that the higher court did not decide the issue pending before it. Therefore, to the extent

Kent holds that the Georgia Supreme Court, by virtue of its remand order, adopted the *Leatherman* standard of review with respect to all excessive punitive damage award claims, it is hereby overruled.

(ii) *State Common Law Excessiveness Claims*. Because *Leatherman* applies only to excessiveness claims raised under the due process clause of the federal constitution, precedent dictates that we must continue to review state common law claims under an abuse of discretion standard. *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. 759, 760-766 (1)-(5) (386 SE2d 120) (1989), vacated by 499 U.S. 914 (111 SC 1298, 113 LE2d 234) (1991), reinstated by 261 Ga. 613, 616-617 (409 SE2d 501) (1991); see also *Scott v. Battle*, 249 Ga. App. 618, 621 (3) (548 SE2d 124) (2001). The Georgia Supreme Court explained in *Hospital Auth. of Gwinnett County v. Jones* that the right to punitive damages derives from the common law. 259 Ga. at 764 (5) (b); 261 Ga. at 616-617(2). This Court has also held that the right to punitive damages is "as old as the right of trial by jury itself," is a "well established principle of the common law," and "is not, as many seem to suppose, an innovation upon the rules of the common law." (Citations omitted.) *K-Mart Corp. v. Hackett*, 237 Ga. App. 127, 132-133(2) (514 SE2d 884) (1999). Our deferential standard of review in punitive damages cases is, in fact, well over two centuries old and derives from the aptly named English common law case, *Huckle v. Money*, 2 Wills. 205, 95 Eng. Rep. 768 (K. B. 1763). See *Seaboard Air-Line Ry. v. Miller*, 5 Ga. App. 402, 405 (63 SE 299) (1908). The King's Bench in *Huckle* opined that "it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." See *Seaboard*, 5 Ga. App. at 405,

quoting *Huckle*. This principle underlies OCGA § 51-12-12 (a), pertaining to court interference with damages awards generally: "The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case."

Applying this principle to appellate courts, the Georgia Supreme Court explained that reviewing courts lack

> the broad discretionary powers invested in trial courts to set aside verdicts, and where the trial court before whom the witnesses appeared had the opportunity of personally observing the witnesses has approved the verdict, this court is without power to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means.

(Citation and punctuation omitted.) *Smith v. Milliken*, 247 Ga. 369, 372(3) (276 SE2d 35) (1981). The reasoning implicit in this rule is that an excessive or inadequate verdict constitutes a mistake of fact rather than of law. *Moody v. Dykes*, 269 Ga. 217, 221-222(6) (496 SE2d 907) (1998), citing *Southeastern Security Ins. Co. v. Hotle*, 222 Ga. App. 161, 165(2) (473 SE2d 256) (1996). Under our system of jurisprudence, the resolution of factual issues is usually for the jury. Id.; (Citation omitted.) *McClure v. Gower*, 259 Ga. 678, 684 (385 SE2d 7) (1989) ("the amount of the punitive damages award is 'exclusively a question for the jury to determine.'") The U.S. Supreme Court, however, broke with common law tradition (and avoided the application of the Seventh Amendment[2]) by

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[2] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and*

characterizing a jury's decision to award a certain amount of punitive damages as a question of law.[3] *Leatherman*, 532 U.S. at 437. Some scholars consider this a "dangerous development," one that moves "the locus of decision-making away from juries and trial judges and toward the appellate courts." (Footnote omitted.) Dorsaneo, "Reexamining the Right to Trial by Jury," 54 S.M.U. L. Rev. 1695, 1733 (2001). In fact, in *Todd v. Roadway Express, Inc.*, 178 F. Supp. 2d 1244 (M.D. Ala. 2001), the defendant argued that since the punitive damages inquiry is no longer a factual one, the plaintiff is no longer entitled to a jury trial on punitive damages. The district court refused to extend *Leatherman* to this extreme. Id.

Because the Georgia Supreme Court has not embraced the idea that an award of punitive damages is a question of law, we believe we are bound by precedent to defer to the jury's factual decision-making process and to apply an abuse of discretion standard when evaluating whether an award is excessive under the common law. See e.g., *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. at 766(5); *Scott v. Battle*, 249 Ga. App. at 621(3); *Southeastern Sec. Ins. Co v. Hotle*, 222 Ga. App. at 164(1).

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no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (Emphasis supplied.) U.S. Const., Amend. VII.

[3] Whether the jury's award of punitive damages is really the result of a factual inquiry is a subject of some dispute. Certainly, as Justice Ginsburg points out in her dissent, punitive damages "derive their meaning from a set of underlying facts as determined by a jury." *Leatherman*, 532 U.S. at 446 (Ginsburg, J., dissenting.) Nevertheless, what a jury does with those facts is a kind of case-by-case policymaking that involves consideration of broader issues, like deterrence and retribution. See Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 996, 1011-1012 (Oct. 2001).

(b) *Criteria for Evaluating "Excessiveness" of Punitive Damages Awards*

When an appellant has properly raised a federal due process claim, the reviewing court must apply the three "guideposts"[4] set out in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (116 SC 1589, 134 LE2d 809) (1996), in its de novo review of whether the award of punitive damages is grossly excessive. *Leatherman*, 532 U.S. at 440. When an appellant has not raised a federal constitutional due process claim, however, we apply state common law criteria for determining whether a punitive damages award is excessive. See id.

The Georgia Supreme Court has held that an award of punitive damages under OCGA § 51-12-5.1 is to deter the repetition of reprehensible conduct by the defendant or others. (Citation omitted.) *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. at 614 n. 2 (1), 614-615(1). "Because deterrence is based on factors other than the actual harm caused, we rejected the notion that punitive damages must necessarily bear some relationship[5] to the actual damages awarded by the jury." Id. at 614(1). Instead, the appellate courts look to see whether the award "shock[s] the judicial conscience." (Citation and

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[4] These guideposts are: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Leatherman*, 532 U.S. at 440.

[5] "The concept of proportionality as a *legal* limitation on the amount of punitive damages applies, in Georgia, only when damages are given to compensate for wounded feelings." (Emphasis original.) *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. at 762 (2). See OCGA § 51-12-5.

punctuation omitted.) *Wilson Welding Svc. v. Partee*, 234 Ga. App. 619, 620 (507 SE2d 168) (1998). This test, which has been applied to damages awards based on jury verdicts generally, has a very long history and has been more fully elaborated thus:

> Before the verdict will be set aside on the ground that it is excessive, where there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear exorbitant, flagrantly outrageous, and extravagant. It must carry its death warrant upon its face. Although a verdict may be large and generous, where the evidence abundantly authorized a finding for the plaintiff, this court does not feel authorized under the law to set the verdict aside on the sole ground that it is excessive, there being nothing in the record to indicate prejudice or bias on the part of the jury, and the verdict having been approved by the trial judge.

(Citations and punctuation omitted.) *Western & A. R. R. v. Burnett*, 79 Ga. App. 530, 542-543 (7) (54 SE2d 357) (1949). Of course, an appellate court may look to the ratio of compensatory to punitive damages for some evidence that the punitive damages award is infected by bias or prejudice. See *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. at 614(1); *Southeastern Security Ins. Co. v. Hotle*, 222 Ga. App. at 164(1)(e); *Oglethorpe Power Co. v. Sheriff*, 210 Ga. App. 299, 301-302(4)(c) (436 SE2d 14) (1993). We believe the *Gore* guideposts might also be helpful in determining whether an award of punitive damages is infected by bias or prejudice.[6]

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[6] However, we note that many scholars have found *Gore* as imperfect an attempt to evaluate punitive damages awards as those

3. *The Award of Punitive Damages Against Appellants*

(a) *Appellants Abandoned Their Federal Due Process Excessiveness Claim*

In their enumerations of error, appellants failed to assert that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[7] Instead, they simply asserted the award was "excessive." In two sentences at the very end of their appellate brief, however, appellants noted that "punitive damages also violates the Due Process Clauses of the Georgia[8] and United States Constitutions," citing *Gore*. Appellants did not argue that the award was "grossly excessive"; rather, it alleged the appellees' injury was "purely economic in nature" and "evinced no indifference to or reckless disregard for the health and safety of others." Pretermitting whether this adequately enumerated an "excessiveness" claim under the federal due process clause, we considered the claim of error abandoned because appellants failed to cite to any relevant facts, give record citations, or present any legal analysis supporting that assertion. Court of Appeals Rule 27(c)(2), (3). An

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fashioned by state courts. See "Developments in the Law," 113 Harv. L. Rev. 1783, 1792-1795 (2000). For example, the *Gore* guideposts combine a number of variables that are not specifically weighted. Consequently, these "variables make it difficult for a court to find precedential value in a prior decision, because it is nearly impossible to determine how an earlier court valued any one of them." (Footnote omitted.) Leading Case, 115 Harv. L. Rev. 356, 362 (2001).

[7] The issue was raised in the trial court in appellants' amended motion for j.n.o.v. or, in the alternative, new trial.

[8] We also find that appellants abandoned any claim of error under the due process clause of the Georgia Constitution. Had that claim been preserved, however, our analysis would be quite similar to that applied to common law excessiveness claims. See *Hospital Auth. of Gwinnett County v. Jones*, 259 Ga. at 763-766 (5); 261 Ga. at 615-617 (2).

assertion of error followed by a case citation is *not* legal argument. As we have explained, legal analysis "is, at a minimum, a discussion of the appropriate law as applied to the relevant facts." *Dixon v. Metropolitan Atlanta Rapid Transit Auth.*, 242 Ga. App. 262, 266(4) (529 SE2d 398) (2000). Because appellants abandoned any error with respect to a federal constitutional excessiveness claim, we are not required to conduct a de novo review of the punitive damages award or to apply the *Gore* guideposts. *Leatherman*, 532 U.S. at 433. Consequently, we reinstate Division (6)(c) of our original opinion, *Time Warner*, 245 Ga. App. at 356(6)(c) (2000), finding no abuse of discretion in the amount of the punitive damages award under Georgia common law.

(b) We recognize, however, that the Georgia Supreme Court may choose to apply *Leatherman* and *Gore* to all excessive punitive damages claims or to the claim presented in this case. Therefore, as a matter of judicial economy, we also review the punitive damages award de novo and apply the *Gore* guideposts.

(i) *Reprehensibility*. We begin our analysis by examining the degree of reprehensibility of appellants' conduct in this case. In examining the degree of reprehensibility of a defendant's conduct, the Supreme Court in *Gore* outlined a number of "aggravating factors," including whether the harm was more than "purely economic in nature," and whether the defendant's behavior "evinced indifference to or reckless disregard for the health and safety of others." *Gore*, 517 U.S. at 576. Here, although the harm to Flags and Fund was primarily economic, it was caused by conduct we find especially reprehensible. Appellants' intentional breach of its fiduciary duty revealed a callous indifference to the

financial well-being of its limited partners and their individual investors.

After closely scrutinizing over 80 volumes of record and transcript during the first appeal, we found that the evidence adduced supported the jury's conclusion that appellants acted in concert to breach SFOG's fiduciary duty to its business partners. Six-and-a-half pages of our published opinion are dedicated to describing appellants' scheme to devalue their partners' investment for their own benefit. *Time Warner*, 245 Ga. App. at 335-341. We found this evidence clearly and convincingly supported an award of punitive damages under OCGA § 51-12-5.1(b) because the evidence showed that "the appellants withheld vital business information from Fund and Flags, undertook to compete with them, took money belonging to them, and carried out a plan to depress the value of their investment, the Six Flags Over Georgia Park." Id. at 356 (6)(a). Moreover, the jury found a specific intent to cause harm, id. at 334-335 n.3, 356 (6)(b), which allowed it to award damages in excess of the $250,000.00 cap. OCGA § 51-12-5.1(f), (g).

Appellants' conduct toward its partners and those who invested in the limited partnership was part of a premeditated plan surreptitiously executed over a period of years. Appellants' conduct was deceitful, self-serving, and financially damaging. More importantly, however, appellants' conduct was a breach of fiduciary duty, a violation of a confidential relationship of trust requiring the utmost in good faith. Even though Flags and Fund were, as appellants asserted at oral argument, controlled by "sophisticated business people," they were nevertheless entitled to rely on their general partner. Appellants' conduct was, in short, the kind of behavior we find "deserving of reproof, rebuke, or censure; blameworthy" —

the very definition of "reprehensible." The Random House Webster's Unabridged Dictionary, 2nd Ed., p.1634. A California court, which recently considered a comparable issue upon remand under *Leatherman*, held: "Trickery and deceit are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct." (Citation and punctuation omitted.) *Simon v. San Paolo Holding Co.*, ___ Ca.App.2d Dist. ___ (2001 Cal. App. LEXIS 2023; Nov. 7, 2001). We agree.

(ii) *Ratio*. In *Gore*, although the U.S. Supreme Court held that the ratio of compensatory to punitive damages[9] is a factor to consider in determining whether the punitive damages award is excessive, it refused to draw a bright line. The court explained that "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness properly enters into the constitutional calculus." (Citations and punctuation omitted.) *Gore*, 517 U.S. at 582-583 (III). It is not enough, as some have suggested, "to do the math"; we must also do the reasoning.

In this case, the ratio of compensatory to punitive damages is 1-to-1.3. We see no "shocking disparity" inherent in this figure. Cf. *Gore*, 517 U.S. at 581 n. 34, 582-583 (1:500 ratio reversed). Nor does it appear to approach that

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[9] Appellants suggested that because the award of punitive damages in this case is currently the largest in Georgia history, that it is excessive. An award of punitive damages, however, should not be viewed in the abstract or compared with awards from other cases. The punitive damages award must be viewed in its unique context, in light of the facts of the case and with reference to the actual damages awarded and the potential harm that could have resulted from the defendant's conduct. See *Gore*, 517 U.S. at 580-583.

fuzzy line suggesting the bounds of "constitutional impropriety." Id. at 581, citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (111 SC 1032, 113 LE2d 1) (1991) (1:4 ratio upheld); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 451, 462 (III) (113 SC 2711, 125 LE2d 366) (1993) (1:10 ratio upheld). More importantly, however, given the amount of intentional economic damage inflicted by the appellants, corporate entities with collective assets measured in billions of dollars, we believe the award of punitive damages was reasonably calculated to punish them and to deter such conduct in the future. See *Simon v. San Paolo Holding Co.*, ___ Ca. App. 2d Dist. ___ (2001 Cal. App. LEXIS 2023, 2040-2043; Nov. 7, 2001).

(iii) *Sanctions for Comparable Misconduct*. Georgia law authorizes double and treble damages for a variety of unfair and deceptive business practices, certain securities violations, and generally corrupt corporate behavior.[10] Statutory multiple damages awards are intended to deter those who might engage in deceptive practices when the risk of getting caught would otherwise be an acceptable cost of doing business. See, e.g., *Zeeman v. Black*, 156 Ga. App. 82, 273 SE2d 910 (1980) (private right of action under OCGA § 10-1-399 furthers policy of protecting the citizenry from unfair business practices). The award of punitive damages in this case is well within the range of comparable multiple damages penalties for dishonest business conduct. The award speaks to deterrence and appears in all respects reasonably calculated to further that

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[10] See e.g., OCGA § 10-1-399 (c) (Fair Business Practices Act; treble damages for intentional violations); OCGA § 16-14-6 (c) (RICO; treble damages for injury under section); OCGA § 10-1-763 (b) (double damages for wilful misappropriation of trade secrets); OCGA § 10-5-14 (h) (2) (treble damages for certain securities violations).

end. Given existing Georgia statutes for comparable corporate misbehavior, appellants received fair notice not only of the kind of conduct that would subject them to punishment, but also of the severity of the penalty that might be imposed. Cf. *Gore*, 517 U.S. at 585.

Applying a de novo standard of review and weighing the *Gore* guideposts, we find that the award of punitive damages under these circumstances does not violate appellants' federal due process rights.

Judgment affirmed and reinstated on remand. Blackburn, C. J., Pope, P. J., Smith, P. J., Ruffin, Eldridge, Barnes, Miller, Phipps and Mikell, JJ., concur. Andrews, P. J. and Johnson, P. J., recused.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Case No. S02C1177

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

v.

SIX FLAGS OVER GEORGIA, LLC, ET AL.

[Sept. 16, 2002]

COURT OF APPEALS CASE NO. A00A0120

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Fletcher, C.J., and Hunstein, J., who dissent.

Sherie M. Welch, Clerk

APPENDIX C

SUPREME COURT OF GEORGIA
ATLANTA

Case No. S02C1177

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.

v.

SIX FLAGS OVER GEORGIA, LLC, ET AL.

[Oct. 11, 2002]

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, C.J., and Hunstein, J., who dissent.

Supreme Court of the State of Georgia

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

APPENDIX D

COURT OF APPEALS
OF THE STATE OF GEORGIA

No. A00A0120

TIME WARNER ENTERTAINMENT COMPANY, LP, ET AL.
v.
SIX FLAGS OVER GEORGIA, LLC, ET AL.

[Nov. 6, 2002]

The Court of Appeals hereby passes the following order:

On September 16, 2002, the Supreme Court of Georgia denied the Application for Certiorari filed by the appellants. On October 11, 2002, the Supreme Court of Georgia denied appellants' Motion for Reconsideration. This Court received the Supreme Court's remittitur on November 1, 2002, and on that same day, this Court received a "Notice of Consent and Joint Motion to Stay Remittitur" and a "Consent to Stay Remittitur and Stipulations to Maintain Status Quo".

It is the general policy of this Court not to stay remittiturs on applications for Certiorari to the United States Supreme Court. The parties are free to file a Motion to Stay the Remittitur in the United States Supreme Court, or a Motion to Recall the Remittitur in the United States Supreme Court, should this Court have previously issued its remittitur. In fact, the parties filed such motions in the United States Supreme Court in an earlier Application for

Certiorari to that Court. The United States Supreme Court ordered this Court to Stay the Remittitur, which had already issued, which this Court construed to be an order to recall the remittitur, and this Court did recall its remittitur.

This Court sees no reason to deviate from its general practice and upon consideration of the Motions to Stay Remittitur, the same are hereby DENIED. The parties are free to file such motions in the United States Supreme Court as they deem appropriate to stay or recall the remittitur.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

/s/ William L. Martin, III

APPENDIX E

IN THE COURT OF APPEALS OF GEORGIA
THIRD DIVISION

No. A00A0120

TIME WARNER ENTERTAINMENT COMPANY, L.P. ET AL.

v.

SIX FLAGS OVER GEORGIA, L.L.C. ET AL.

[Decided July 13, 2000]

Before: ANDREWS, PJ., RUFFIN, and ELLINGTON, JJ.

ELLINGTON, Judge.

This appeal is from a jury verdict in favor of a limited partnership and its sole limited partner against the general partner which from 1991 through 1998 operated the partnership's business investment, the Six Flags Over Georgia theme park. Appellee Six Flags Over Georgia, L.L.C. ("Flags") is the limited partnership which owns the park. Appellee Six Flags Fund, Ltd., L.P. ("Fund") is the partnership's sole limited partner and is comprised of individual investors.[1] Although appellant Six Flags Over Georgia, Inc. ("SFOG") was the named general partner corporate entity responsible for operating the park,

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[1] Appellee Six Flags Claims Trust is not a limited partner and was awarded no damages. It was created solely to fund the litigation and handle any proceeds of the litigation.

appellees alleged that Time Warner Entertainment Company, L.P. ("TWE"), acting through and in concert with its subsidiaries SFOG, Six Flags Entertainment Corporation ("SFEC"), and Six Flags Theme Parks, Inc. ("SFTP"), assumed the role of general partner and directed the activities of the partnership. The complaint[2] alleged, in essence, that the general partner damaged the appellees by preferring its own financial interest over that of the partnership and of the limited partner. The jury returned a verdict in favor of the appellees, awarding a total of $197,296,000 in compensatory damages and $257,000,000 in punitive damages.[3] Appellants contend they are entitled to a new trial because (1) the trial court should have directed a verdict in favor of certain "non-partner defendants"; (2) the court should have directed a verdict in appellants' favor on appellees' "capital improvements" claim; (3) the evidence of breach of fiduciary duty was insufficient to support the jury's verdict; (4) the court erred in admitting or excluding certain evidence; (5) the court impermissibly impugned defense witnesses in the jury's

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[2] The complaint set forth counts for breach of fiduciary duty, conversion, fraud, breach of contract, conspiracy to breach contractual obligations, and for an accounting. Of the claims actually submitted to it (breach of fiduciary duty, conversion, and breach of contract), the jury found in favor of appellees on the breach of fiduciary duty claim only.

[3] The jury found that each of the appellants breached the fiduciary duty owed Fund and awarded it $149,175,000 in compensatory damages. The jury also found that each of the appellants breached the fiduciary duty owed Flags and awarded it $48,121,000 in compensatory damages. The jury, finding that each of the appellants acted with a specific intent to harm, awarded punitive damages as follows: from TWE, $183,750,000 to Fund and $61,250,000 to Flags; from SFEC, $6,000,000 to Fund and $2,000,000 to Flags; from SFTP, $2,250,000 to Fund and $750,000 to Flags; from SFOG, $750,000 to Fund and $250,000 to Flags.

presence; (6) the court erred in giving certain jury charges; (7) compensatory damages were either speculative or excessive; and, (8) punitive damages were either unwarranted or excessive. Finding no reversible error, we affirm.

Viewed in the light most favorable to support the jury's verdict, the record reveals the following relevant facts: Flags, the partnership which owns the Six Flags Over Georgia theme park, has existed since 1967. The park, much like its sister park in Texas, was developed as a limited partnership comprised of a limited partner investor and a general partner park operator. The rights and responsibilities of the partners were set out in a written agreement which was amended in 1973. The agreement provided that the general partner had "exclusive control of the management of the business and affairs of the limited partnership" and would receive, among other compensation, 70 percent of the park's net cash flow. The partnership agreement also required the general partner to make certain "minimum" capital improvements each year. The 30-year partnership agreement expired on December 31, 1997. When the agreement ended, ownership of the park reverted wholly to the limited partner, Fund, which could then elect to sell the park or to entertain bids from prospective general partners who wished to enter a new partnership agreement. Appellees' principal witness, Avram Salkin, a Fund investor and signatory on the partnership agreement, has acted as Fund's representative for the last 30 years.

In 1990, TWE executives investigated acquiring all seven of the Six Flags theme parks and marketing them as "a national brand." In 1990, TWE bought nineteen percent, with an option to buy an additional thirty percent, of the stock of Six Flags Corporation (SFTP's predecessor), the company which owned five of the Six Flags theme

parks and controlled the Georgia and Texas parks' general partner corporations. TWE executive Bob Pittman, the "architect" of the Six Flags deal, pitched the idea of acquiring Six Flags Corporation to the Time Warner, Inc., Board of Directors in July 1991. On December 26, 1991, TWE exercised its option and bought a controlling interest in SFTP, which owned SFOG, the named general partner of the Georgia park. Pittman, who was president of Time Warner Enterprises, a division of TWE, then became chairman of the board and CEO of SFEC, the TWE subsidiary which owned SFTP. He held those positions until 1995 when he left TWE for America Online. Pittman admitted that "as president of Time Warner Enterprises or Six Flags Entertainment, we were making decisions about the Georgia Park."

As early as February 19, 1991, months before TWE acquired controlling interest in the parks, Pittman began negotiating with the Coca-Cola Company to sell it the exclusive right to market Coca-Cola products at all seven Six Flags theme parks. A confidential agreement dated November 27, 1991, made the Coca-Cola deal contingent upon TWE acquiring a controlling interest in SFTP. The agreement was signed by Pittman as CEO of Time Warner Enterprises and by a Coca-Cola executive. In exchange for the promised sale of these rights, TWE received a one-time $20 million "sponsorship fee" or "marketing advance." On December 26, 1991, TWE used these funds and funds from other sources to exercise its option and buy the additional 30 percent of SFTP stock and controlling interest of the company. On that same date, Coca-Cola and SFEC executed a final marketing agreement. Salkin was not informed that this Flags asset had been sold until 1995, and when he asked to see the Coca-Cola agreement, he was told it was confidential. Flags never received its $2.8 million share of the $20 million fee.

In April 1992, Salkin was invited to meet with Pittman and other TWE and SFEC executives. Pittman immediately wanted to discuss buying out the Georgia theme park. Of course, Salkin could not simply negotiate a sale; he was required by his agreement with Fund investors to "shop" the park to the highest bidder when the partnership agreement expired. When TWE, Flags, and Fund representatives met again in October 1992, Pittman presented a 150 million-dollar plan for the Georgia park which included building a hotel and an island. According to Salkin, however, Pittman conditioned the plan upon "some type of a deal," and hinted that if Fund and Flags did not cooperate, TWE would build a competing park and would not make capital investments in new thrill rides for the Georgia park. Salkin said Pittman told him that TWE was "not interested in being in the business of managing assets for others."

A year after this meeting, Time Warner, Inc. executives contacted a real estate broker with Cushman & Wakefield's Atlanta office to discuss acquiring land in Georgia. Although the broker met with a Time Warner, Inc. executive, he was retained by SFTP to purchase land as a nominee and to keep the name of the actual buyer confidential. The broker's commissions were paid by SFTP. He was not authorized to discuss any of the land transactions with Salkin or representatives of Fund or Flags.

The broker acquired 13.7 acres of land immediately adjacent to the Georgia park for $1.8 million. On behalf of Time Warner, Inc., the closing papers were signed by Senior Vice President Paul McNicol. The purchase of this property effectively bounded the Six Flags theme park between the Time Warner, Inc. parcels, the Chattahoochee River, and Interstate 20, thus limiting the park's expansion

opportunities. The broker was also later told to find a 600-700 acre tract of land 40-60 miles from Atlanta and to refer to the project as the "Pennants Theme Park." On June 30, 1994, the broker went on a helicopter ride with Pittman and SFTP and SFOG executives to view land meeting the project criteria. The helicopter ride was paid for by Time Warner, Inc. and categorized as an expense for "development of [a] new park." Time Warner, Inc. authorized the broker to make offers on the land, which he did. Almost a year later, after negotiating potential sales and faxing counteroffers to Time Warner Inc.'s lawyers, the broker was told to cease his efforts.

During this time, TWE also studied the feasibility of developing a competing park. Stephen Ross, Bob Daly, and Terry Semel—executives with TWE's Warner Brothers division, who in April 1995 succeeded Bob Pittman as the primary decision makers for the general partner—hired Harrison Price Company to evaluate building a theme park within 100 miles of Atlanta. The evaluation was done using confidential business information from the Six Flags Over Georgia park. Although no competing theme park was ever built, TWE executives did draft a plan dated October 2, 1996, which outlined spending 12 million dollars on capital improvements for the proposed park every third year and five million dollars for each of the two years in between. From 1991 through 1996, TWE never caused during any one year $5 million to be spent on capital improvements at the Georgia Park, even though all capital expenditures would come from the park's surplus operating cash.

In late 1995 and early 1996, Salkin began the task of shopping the park by visiting competitors' theme parks to evaluate them as prospective bidders for general partner. According to Salkin, he learned that major capital invest-

ments, particularly in new thrill rides, was the key factor that drove attendance and profits at the parks. When Salkin toured the Georgia park in May 1996, he discovered that the park's operators had been asking the general partner to install an inverted roller coaster, "Batman the Ride," since 1992. Salkin, however, had been told by TWE executive Ross that the Georgia park would not get the coaster in 1996 because park management had agreed that the Olympics would adversely impact park attendance that year. The park operators told Salkin that, although they were concerned about the impact of the Olympics, this did not change their desire to add the Batman coaster to the park, and stated that they were trying on their own to find a way to market the park during the Olympics. Salkin also testified that Flags had been over-charged for the old but refurbished Viper roller coaster ride which had been installed in 1992. Further, there was evidence that the Georgia park had substantial "deferred maintenance" and needed between $7 and $10 million in basic repair. Salkin also discovered that TWE had been signing key park executives, including SFOG President John Bemet, to employment contracts with TWE that became effective when the partnership ended. Salkin testified that the contracts provided that the employee would not compete against TWE, would not disclose business information to anyone, including Fund and Flags representatives, and would not assist anyone in litigation against TWE.

On June 7, 1996, Salkin and his attorney wrote TWE and SFTP executives and informed them that, if they could not reach an agreement to install Batman the Ride in the Georgia park before the opening of the 1997 season, negotiations with TWE for the general partnership would be deferred. Ten days later, Salkin met with TWE executives Ross and Daly and discussed his grievances. On August 1, 1996, TWE agreed to install Batman the

Ride, to transfer land adjacent to the park to Flags, to stop signing park employees to TWE contracts, and to reserve to Fund and Flags any claims each might bring against TWE in future litigation. Consequently, later that month, TWE's Warner Brothers division was allowed to bid for the general partnership. According to Salkin, TWE pledged to build "rides, rides, rides," investing significant amounts in capital improvements, and promised that it was in the amusement park business "to stay." Because TWE made the best offer for the park, Fund selected it to continue as general partner. The parties estimate the present value of the new 30-year partnership agreement at between $286 million and $300 million. On March 19, 1997, the day after the new partnership agreement was executed, SFOG and SFTP sued Salkin and Fund, seeking to resolve those claims which Fund and Flags had previously reserved. The trial court, by consent order, realigned and added parties and this litigation ensued. Less than a year later, TWE sold all seven of the Six Flags theme parks to Premier Parks, Inc. as a "package deal" for $1.9 billion, resulting in earnings to TWE of approximately $453 million.

Appellees' contention was that TWE intended to buy the Georgia park outright and, if it could not, it planned to use its position as general partner to deliberately under-invest in the park to depress its value. According to appellees, TWE's plan was to deter prospective competing bidders and allow TWE to purchase the park or secure the general partnership at reduced cost at the end of 1997. And, because it was in TWE's financial interest to sell all seven of the Six Flags parks as a package, appellees contended TWE intended to get long-term control of both partnership parks.

To establish these claims, Fund and Flags adduced evidence explaining how amusement parks are typically invested in, valued, and sold. The evidence showed that amusement parks are sold (or management contracts are based) on a multiple of park earnings before interest, taxes, depreciation, and amortization ("EBITDA"). Capital investment in an amusement park, especially in major thrill rides, fuels EBITDA growth, which in turn increases the value of the park. Conversely, low or modest capital investment keeps amusement park earnings and growth flat and the park's value depressed.

Other evidence from TWE's own internal documents showed that once it got control of the Six Flags theme parks, it planned to spend considerably less on the Georgia park than on any of its wholly owned parks. For example, a September 1991 confidential memorandum revealed a plan to make "10 percent annual increases in spending at each of the owned parks and a consistent decline in spending at the partnership parks as their agreements with the company approach their expiration date." As TWE later demonstrated in a slide show presentation to its executives entitled "Six Flags Strategic Choices," the plan to lower capital expenditures was a choice, using their own word, to "milk" the park as part of an overall strategy to "eventually sell pieces or [the] whole business."

TWE documents also revealed that TWE did, in fact, invest considerably less in the Georgia Park as compared to the wholly owned parks. Evidence was produced that TWE consistently installed new thrill rides in its wholly owned parks, following a "major/minor plan" to make large capital investments in a major attraction every second or third year followed by a minor new attraction in the year or years in between. During TWE's 7-year tenure as general partner of the Georgia park, however, the only

thrill ride it voluntarily installed was 1992's Viper roller coaster, a 20-year-old traditional coaster which had been removed from the Chicago park to make room there for Batman the Ride. The Viper was considered a minor capital expenditure and a minor new attraction. Each of the owned parks, however, received major new rides every second or third year. And, by 1995, four out of the five wholly owned parks had received Batman the Ride, an inverted coaster, which significantly increased EBITDA at each of those parks. Salkin testified that, after Batman the Ride was installed in Georgia, the park's value increased by 40 percent and pushed its EBITDA to $28 million. Salkin further testified that if the Georgia park had gotten Batman the ride in 1995 and another major attraction in 1997, the park's EBITDA would have risen to approximately $40.7 million, giving it an estimated value in the $500 to $600 million dollar range.

In fact, there was evidence that Batman the Ride had been purchased specifically for the Georgia park's 1995 season, but it was diverted to TWE's wholly-owned St. Louis park because, according to notes from a July 12, 1995 meeting at Warner Brothers Studios between TWE and its business partners, "despite the quick return [on investment], putting an inverted coaster into the [Georgia] Park could increase the limited partner's leverage in negotiating with other potential strategic partners in 1998 and beyond." Consequently, TWE's installation of the coaster would be "subject to a deal with the limited partners." There was evidence that the Olympics were never a factor in TWE's decision to delay installation of the ride, and that installation of a major ride in the Texas partnership park was also delayed until a deal with TWE was reached.

In addition to evidence that TWE withheld capital expenditures on major attractions in the Georgia Park, evidence was also produced that it withheld or distorted requested financial information necessary for Flags and Fund to adequately assess the park's performance and value. In fact, Salkin testified that he stopped receiving detailed monthly financial reports when he started to shop the park in 1995. Salkin said he repeatedly requested data on the park's value and performance, the effect of coasters on EBITDA, the level of capital expenditures, and the park's projected future value and performance, but that he received only scant and incomplete information. Fund did not receive a 30-year projection showing, by TWE's own estimation, that the present value of the Georgia park was close to $600 million. There was evidence that TWE did not divulge this information because it wanted to induce Fund to choose from TWE's bid proposals an arrangement with a higher annual payment and a smaller percentage of profits. Without the information he requested, Salkin testified he could not adequately evaluate the proposals received from other bidders or from TWE. Moreover, there was evidence that the competing bidders, having only the information Salkin had, were induced to make conservative, and consequently losing, bids for the general partnership.

Appellees' expert, a management consultant in the theme park industry, testified about what a prospective bidder was warranted in investing in the Six Flags Over Georgia theme park. He opined that the park was "under-invested," "not keeping pace," and "suffering" compared to comparable parks. Further, in a time when Atlanta's population and economy were growing much faster than that of the other Six Flags cities, the Georgia Park should have been able to capture the market in 1997 and generate $100 million instead of the $87.8 million it brought in.

Using a conservative 10.7 multiple of EBITDA, the expert opined that the Georgia park, had it been properly managed and invested, would warrant an investment of about $442 million in 1998. Using the higher 13.6 multiple of EBITDA that TWE actually used in its sale of all seven Six Flags theme parks to Premier Parks in 1998, the warranted investment could have been as high as $560 million.

Appellees also presented evidence showing that TWE charged Flags for expenses that were not allowed under the partnership agreement. TWE charged over $4 million of its corporate expenses—for example, executive lunches at New York's Tavern on the Green and luxury automobiles for TWE executives—to the partnership. TWE also overcharged Flags for the Viper roller coaster by almost $1.4 million. Adding these damages to those attributed to the lost Coca-Cola fee, lost park income, and lost park value, appellees' damages expert estimated that Fund and Flags together suffered $239,363,642 in economic damages over the years appellants acted as general partner.

1. In three enumerations of error, Appellants argue the trial court should have directed a verdict or judgment notwithstanding the verdict with respect to certain defendants and claims. A directed verdict is appropriate "only if there is no conflict in the evidence as to any material issue and the evidence introduced, construed most favorably to the party opposing the motion, demands a particular verdict. OCGA § 9-11-50 (a)." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 137(1), 508 S.E.2d 646 (1998). The same standard also applies to our review of the trial court's decision to deny appellants a judgment notwithstanding the verdict. *Id.*

(a) Appellants contend the evidence adduced was insufficient to support the jury's finding that they breached the fiduciary duty owed Flags and Fund. We disagree.

Fiduciary duties and obligations are owed by those in confidential relationships, that is, relationships "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." OCGA § 23-2-58. See *Atlanta Market Center Mgmt. Co. v. McLane*, 269 Ga. 604, 606(1), 503 S.E.2d 278 (1998). Appellants admitted and the evidence shows that SFOG was a general partner with such fiduciary duties. Moreover, as for the reasons set forth in Division 1(b), TWE, SFTP, and SFEC were also liable for any breach of SFOG's fiduciary duty.

We conclude that the evidence, viewed in the light most favorable to the jury's verdict, showed that appellants engaged in self-dealing conduct that specifically harmed appellees. For example, appellants kept secret profits derived from the sale of a partnership asset, the exclusive right to sell Coca-Cola products in the park. This was a breach of fiduciary duty. See *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 95(1), 179 S.E.2d 88 (1970); see also OCGA § 14-8-21 ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from . . . any use by him of its property."). There was also evidence which could support the conclusion that the general partner engaged in self-dealing by depressing the value of the park by under-investing in it and then withholding information so that it could acquire the park at a discount. This was also a breach of fiduciary duty. See *Ledbetter v. Ledbetter*, 222 Ga.App. 858,

861(1), 476 S.E.2d 626 (1996); see 59A AmJur2d, Partnerships, § 443. Because the evidence supports the jury's verdict, we will not disturb it.

(b) Appellants contend the trial court should have directed a verdict in favor of "non-partner defendants" SFTP, SFEC, and TWE because only the subsidiary SFOG, as the named general partner corporate entity, owed Fund and Flags a fiduciary duty. We cannot agree.

Appellants' argument is founded upon the premise that appellees failed to adduce evidence imputing liability to TWE, SFTP, and SFEC, the parent corporations, for subsidiary SFOG's acts under alter ego, agency, or joint venture theories. However, whether the parent corporations were vicariously liable under any of these theories for SFOG's acts was not the main basis of liability argued below. Rather, the appellees argued at trial, as they do now on appeal, that the parent corporations aided and abetted SFOG in a breach of its fiduciary duties.

Although this court has never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty, see *Munford v. Valuation Research Corp.*, 98 F.3d 604, 613 (11th Cir. 1996), we have at least twice implicitly acknowledged that such claims are viable. See *Williams v. Svc. Corp.*, 218 Ga.App. 10, 459 S.E.2d 621 (1995), and *U3S Corp. v. Parker*, 202 Ga.App. 374, 380(4), 414 S.E.2d 513 (1991) ("issues remain to be tried" on the count alleging two defendants "aided and abetted the other two defendants' breach of fiduciary duty"). We have explicitly "acknowledged an aiding and abetting cause of action in torts involving violence, the sale of unregistered securities, breaches of covenants with employment contracts, and fraudulent conveyances." *Munford v. Valuation Research Corp.*, 98 F.3d at 613. And, we have also recognized an aiding and abetting cause of action in many

cases involving the misapplication of trust funds. See, e.g., *Adams v. McGehee*, 211 Ga. 498, 500(4), 86 S.E.2d 525 (1955). Further, other jurisdictions have specifically found that such a cause of action is implicit in their existing case law governing the liability of persons acting in concert. See, e.g., *Granewich v. Harding*, 329 Or. 47, 54-58, 985 P.2d 788 (1999); *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994). Were we required to address this issue, we could follow suit, finding that such a basis for liability is implicit in OCGA § 51-12-30, pertaining to the joint liability of one who procures an actionable wrong. However, because appellants conceded an aiding and abetting theory of liability for breach of fiduciary duty claims at trial, error, if any, was induced. Moreover, because appellants have not enumerated as error the jury's finding of liability on this theory, we lack jurisdiction to consider it.

Appellants' Request to Charge No. 39, entitled "Liability of Other Defendants," specifically contained as one of three alternate bases of liability that "Defendant SFOG, Inc. was substantially aided by another Defendant[.]" Further, after the trial court charged the jury with respect to one who "aids or assists" in a breach of fiduciary duties, appellants' counsel failed to except to the charge on the ground that Georgia law does not recognize a claim for aiding a breach of fiduciary duties. Instead, counsel complained only that the trial court did not insert the word "substantially" before "aids." Appellants have not enumerated the giving of this charge as error or the jury's finding of liability on this basis as error.

"It is well settled that a party cannot complain of an appellate ruling, order, or judgment that his own legal strategy, litigative procedure, or conduct aided in causing." (Citations omitted.) *Strong v. Wachovia Bank*,

215 Ga.App. 572, 573(2), 451 S.E.2d 524 (1994). Moreover, this court lacks jurisdiction to consider inadequately enumerated grounds. OCGA § 5-6-40; *Meeks v. State*, 178 Ga.App. 9, 14(4), 341 S.E.2d 880 (1986). Consequently, we will not address the validity of this basis for liability, but note only that if we did, the evidence adduced supports the jury's finding that appellants aided and abetted SFOG in a breach of fiduciary duty to Flags and Fund. See *Holmes v. Young*, 885 P.2d at 309.

(c) Appellants also contend the trial court erred in denying their motion for judgment n.o.v. on appellees' "capital improvements claims." Appellants argue that because the "Capital Improvements" provision of the Partnership Agreement required the general partner to spend at least $800,000 per year on capital improvements, and because appellants spent well in excess of that, they satisfied their capital improvement obligations to the partnership and the limited partner and consequently cannot be held liable for breaching their fiduciary duty to make capital improvements. See *Westminster Properties, Inc. v. Atlanta Assoc.*, 250 Ga. 841, 842-843(1), 301 S.E.2d 636 (1983).

Addressing these contentions required that the partnership agreement be construed to determine the general partner's obligations with respect to making capital improvements. In this case, the trial court submitted the partnership agreement to the jury without construing it.[4] Although the court has a duty to construe contracts submitted to it, a new trial will not be granted where the contract is submitted to the jury and properly construed by it. *South Ga. Trust Co. v. Neal*, 174 Ga. 24(2), 161 S.E.

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[4] Appellants argued they met their capital improvement obligations under the partnership agreement in a motion for summary judgment, in their trial brief, in their motion for directed verdict, and their motion for judgment n.o.v. The court denied the motions without opinion.

815 (1932). As explained below, we find that the partnership agreement required the general partner to make discretionary decisions in good faith as to the amount and type of capital improvements, and that there was evidence sufficient to support the conclusion that the general partner breached a duty to act in good faith in making these decisions. Because the jury verdict was consistent with this construction of the partnership agreement and with a finding that the general partner in concert with the other appellants acted in bad faith, we find no error.

"An issue of contract construction is at the outset a question of law for the court." *Grier v. Brogdon*, 234 Ga.App. 79, 80(2), 505 S.E.2d 512 (1998). The first step is to look to the four corners of the instrument to determine the meaning of the agreement from the language employed. *Terry v. State Farm &c. Ins. Co.*, 269 Ga. 777, 778-779(2), 504 S.E.2d 194 (1998). If the contract language is ambiguous, however, then the court must apply the applicable rules of construction. *Grier v. Brogdon*, 234 Ga.App. at 80, 505 S.E.2d 512; OCGA § 13-2-2. "The cardinal rule of contract construction is to ascertain the intention of the parties." (Punctuation omitted.) *Amstadter v. Liberty Healthcare Corp.*, 233 Ga. App. 240, 242(1), 503 S.E.2d 877 (1998); OCGA § 13-2-3. If, after applying the rules of construction, the language remains ambiguous, then the finder of fact must resolve the ambiguity. See id.

The contract provision at issue sets a capital improvements "minimum," a floor beneath which spending on capital improvements for any calendar year cannot fall.[5]

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[5] The Partnership Agreement provides:

5. *Capital Improvements*. The General Partner, regardless of whether or not any Capital Improvement Funds have been set

"Minimum" here means "the least quantity, amount." Random House Dictionary of the English Language (1980), p. 571. It does not mean "only," which means "solely," or "exclusively." *See L & B Constr. Co. v. Ragan Enterprises*, 267 Ga. 809, 813, 482 S.E.2d 279 (1997). Consequently, this provision means that the general partner must make *at least* $800,000 in capital improvements in a calendar year and not *only* $800,000 per calendar year. The provision does not state that the general partner cannot or should not cause more to be invested. Further, the "carry forward" portion of the provision only lowers or eliminates the annual minimum capital improvements requirements for up to two years under certain conditions. It does not set what the general partner should invest in the park in any given year.

Salkin testified that this particular contract provision was added in the early 1970s because the general partner at the time was on the verge of bankruptcy and the partnership was concerned "that the park be maintained appropriately." The contract provision was intended to require the general partner to invest "separate and apart from the partnership" at least $800,000 of its own money

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aside for the calendar year, will cause the limited partnership in each calendar year beginning on or after January 1, 1971, to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately proceeding calendar year (after deducting therefrom the amount of any sums loaned to the limited partnership during such immediately preceding calendar year) or $800,000; provided that, if Capital Improvements actually made during any calendar year exceed the minimum amount herein specified, the excess difference between such minimum amount and the amounts actually expended may be carried forward for two subsequent years as a credit against the obligation of the General Partner to make such minimum Capital Improvements.

in improvements. This provision "had nothing to do with whether the partnership, what [the] partnership would bill[,] but if the partnership didn't have enough money, the general partner would at least put in that [$800,000] as a loan so that the park could be maintained at that time."

Although the partnership agreement does not specify in dollars what the general partner should cause to be invested in the park each year, it gives the general partner exclusive control over the management of the park and the right to set aside and spend capital improvement funds from the gross revenues generated by the park as are necessary to advance the purposes of the partnership. The agreement provides that these purposes include repairing, maintaining, improving, and operating the park, and conducting amusement activities for family entertainment. Nothing in the agreement evinces an intent to give the general partner absolute or uncontrolled discretion as to the amount to be spent on capital improvements or the type of capital improvements to be made. Rather, it may be fairly implied from the agreement as a whole that the general partner was required to exercise discretionary judgment in these matters in good faith.

Where an agreement gives a party discretionary decision-making power, and such power is not left to the absolute or uncontrolled discretion of the party, the discretion is subject to an implied obligation that it be exercised in good faith. *MacDougald Constr. Co. v. State Hwy. Dept.*, 125 Ga.App. 591, 594, 188 S.E.2d 405 (1972); *Automatic Sprinkler Corp. &c. v. Anderson*, 243 Ga. 867, 868-869, 257 S.E.2d 283 (1979). Furthermore,

> Laws in existence at the time a contract is executed are part of that contract. Already in existence at the time the partnership in question here was created was the provision in OCGA § 23-2-58 that partners owe a

> duty to act in the "utmost good faith" with regard to each other.

(Citation and punctuation omitted.) *Wilensky v. Blalock*, 262 Ga. 95, 98(3), 414 S.E.2d 1 (1992). Therefore it follows that the partnership agreement at issue here included, as a matter of law, that the general and limited partner had a fiduciary duty to act in utmost good faith toward each other. Id. Because the capital expenditures provision, construed in context, did not expressly give appellants the right to limit capital expenditures to only $800,000 per year, it did not relieve the general partner's duty to act in the utmost good faith. Id. See also *Southern Business Machines v. Northwest Financial Leasing*, 194 Ga.App. 253, 256(2), 390 S.E.2d 402 (1990).

Moreover, the evidence shows that appellants never interpreted the capital expenditures provision to mean they only had to invest $800,000 per year. TWE executive Daly testified that appellants knew they had a duty to maximize the performance of the partnership parks. Although appellants presented evidence that they exceeded the $800,000 yearly minimum by spending $23.8 million in capital investments in the Georgia park during the seven-year tenure of the general partner, whether the amount and type of capital investments which were made satisfied the fiduciary duty to act in good faith was a question of fact for the jury under the circumstances of this case. *MacDougald Constr. Co. v. State Hwy. Dept.*, 125 Ga.App. at 594, 188 S.E.2d 405.

The partnership agreement required that the general partner perform its managerial responsibilities by determining in good faith the amount of yearly capital improvements to be made in excess of the $800,000 minimum, if any, and how the funds for capital improvement were to be spent. Evidence was presented

that during its seven-year tenure the general partner either delayed or failed to make capital improvements in major thrill rides, which were the most important type of capital investment in terms of maintaining and improving the park's profitability and value. In conjunction with this evidence, additional evidence was presented from which the jury could conclude that the general partner exercised its discretion in these areas, not in good faith, but as part of a plan to under-invest in the park to suppress its value so that appellants could buy the park for a reduced price. Although the general partner presented evidence that it acted in good faith under the terms of the agreement, there was evidence to support a contrary conclusion that the general partner, in concert with the other appellants, acted in bad faith in violation of responsibilities under the agreement and fiduciary obligations to the partnership, by failing to make the amount or type of capital improvements which would have maintained and improved the profitability and value of the park.

Because the jury's verdict is consistent with this view of the evidence, we find no error.

2. (a) Appellants argue the trial court erred in charging the jury as follows:

> Should you find that one or more of the defendants breached any fiduciary duties to the plaintiffs, if you find that the defendants acted in good faith and in a manner that was consistent with the contractual obligations and its fiduciary duty under the general partnership law when taking such actions, you must find for the defendants.

Appellants contend the charge is contradictory. The charge is taken from Defendant's Request to Charge 34. During the charge conference, the court, with assistance from defense counsel, edited the charge by deleting the

paragraphs which came before and after the portion of the charge actually given. And, with the input of counsel, the court added certain phrases until the instant charge was crafted. After the entire charge was read to the jury, defense counsel excepted, objecting only to the court's addition of the phrase "and its fiduciary duty under the general partnership law" because that was "redundant and inconsistent and makes the charge confusing." However that phrase was, in substance, the very phrase appellant's counsel suggested adding. Error in the charge, if any, was self-induced and cannot be complained of on appeal. *Hancock v. Bryan County Bd. of Ed.*, 240 Ga. App. 622, 623(2), 522 S.E.2d 661 (1999); *Levin v. State*, 222 Ga.App. 123, 125(3), 473 S.E.2d 582 (1996). More-over, "where an entirely different objection is argued in a brief, as here, than was asserted at trial, we will not consider it." *Beck v. State*, 235 Ga.App. 707, 709-710(3), 510 S.E.2d 368 (1998). Finally, appellants never contended at trial, by objection or otherwise, that the charge was an incorrect statement of the law. The objection voiced was not sufficiently specific to apprise the court of error pursuant to OCGA § 5-5-24. Accordingly, any claim of error was waived. *Hancock v. Bryan County Bd. of Ed.*, 240 Ga.App. at 625-626(7), 522 S.E.2d 661.

(b) Appellants also contend that a paragraph from the trial court's 13-page instruction on fiduciary duty contained an allegedly burden-shifting charge. However, appellants have not shown that a proper exception to the charge was made and we find no such exception in our review of the record. Error, if any, was not preserved for our review. *Johnson v. Bruno's, Inc.*, 219 Ga.App. 164, 166(4), 464 S.E.2d 259 (1995). Further, appellants have not argued, nor has our review of the charge revealed, that a "substantial error" within the meaning of OCGA § 5-5-24 (c) was committed.

3. Appellants assert in four separate enumerations and throughout their brief that the trial court made numerous evidentiary errors that "hopelessly infected" the trial. To the extent appellants make a cumulative error argument, we reject it. See *Laney v. State*, 271 Ga. 194, 198(11), 515 S.E.2d 610 (1999). The decision to admit or exclude evidence lies in the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. See *Dept. of Transp. v. Mendel*, 237 Ga.App. 900, 902(2), 517 S.E.2d 365 (1999).

(a) (i) Appellants contend the trial court erred in granting appellee's motion in limine to exclude: (1) evidence that Flags was created as a tax shelter, and (2) evidence of the tax consequences to Fund and its investors if the general partner caused more than $800,000 per year to be spent on capital improvements. Appellants argue that this evidence was critical to its defense that the general partnership made only moderate capital improvements in order to generate "tax losses," which was, according to their interpretation of the partnership agreement, what Fund and its investors actually wanted. Appellants overstate the substance of the court's ruling.

The court, adopting the recommendation of the special master, agreed that certain defense themes were irrelevant and prejudicial. Specifically, the appellants were instructed not to inquire into Fund's *individual investors'* wealth, motives for investing, including any tax consequences to them, or on their return on investment. And, appellants were not permitted to inquire into Fund's return on investment, including any tax benefits, *prior to* the time appellants assumed responsibility for managing the park. Appellants were allowed to, and did, cross-examine Salkin on the tax consequences to Fund of capital investments in the park and presented their own expert

testimony covering those points. We see no evidence that appellants were prohibited from making the argument they now advance. Rather, it appears appellants made a strategic decision to argue that the general partner invested much more in the Georgia park than it was obligated to under the partnership agreement because that defense theme was more consistent with the evidence actually adduced from appellants' own witnesses. For example, Bob Pittman testified that he understood the partnership agreement required "some minimum amount" of annual capital investment, however, "every year we greatly exceeded that amount and we weren't even close to being near the minimum." Because appellants were able to present the evidence they contend was excluded, they have failed to show how they were harmed by the court's ruling. Consequently, appellants have not shown reversible error. See, e.g., *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. 365, 371-372(6), 508 S.E.2d 716 (1998) (harm as well as error must be proven).

(ii) The trial court properly excluded a document Fund's lawyers filed with the California Department of Corporations. That document, which contained statements about the return on Fund's investment in the Six Flags theme park and the success of the investment over its lifetime, was not indicative of appellants' performance as general partner and was of dubious relevance to the issues at trial. We see no abuse of discretion. See *Kicklighter v. Woodward*, 267 Ga. 157, 161(4), 476 S.E.2d 248 (1996). Moreover, in light of the fact that appellants established how much Fund originally invested in the Georgia park, how much the park sold for in 1997, and how much Fund received in free cash flow both before and during appellants' tenure as general partner, we do not believe appellants were harmed by the exclusion of this document.

See *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. at 371-372(6), 508 S.E.2d 716.

(iii) The trial court properly excluded "a calculation" pertaining to the value of the new partnership agreement made by Salkin's son, Kenneth. Because the younger Salkin, a college student, did not have the education, training, or experience necessary to give a theme park valuation, the trial court did not abuse its discretion in excluding his calculations. See OCGA § 24-9-67; *Martin v. Baldwin*, 215 Ga. 293, 297(2)(c), 110 S.E.2d 344 (1959).

(iv) Appellants contend the trial court erred in excluding "an admission" by a Fund attorney that the Fund's new general partnership agreement with TWE was a "grand slam plus." The statement was not "excluded"; rather, the trial court denied appellants' motion to compel a document in which the statement was allegedly made on the ground that the document was privileged. Pretermitting whether the document was erroneously withheld, the transcript reveals that appellants, through TWE executive Ross, were able to show that the same Fund attorney admittedly believed "that the Fund had gotten a very, very rich deal." Because appellants have failed to show they were harmed by the exclusion of the complained-of statement, we find no error. *Cantrell v. Northeast Ga. Med. Center*, 235 Ga.App. at 371-372(6), 508 S.E.2d 716.

(b) On November 17, 1998, the first day of trial, the judge entered an order which prohibited appellants from offering evidence tracing the flow of the $20 million Coca-Cola sponsorship fee as a sanction for discovery abuse. Appellants contend this was an unwarranted, or at least disproportionate, sanction. Appellants' arguments are not supported by the record.

On November 10, 1998, the trial court, adopting the Special Master's November 6, 1998 findings and recom-

mendation with respect to this discovery dispute, found that appellants "willfully attempted to obstruct, in violation of court orders," appellees' efforts to obtain the identities of and to take the depositions of witnesses who were knowledgeable about the flow of the Coca-Cola funds in connection with the recapitalization of SFTP and the closing of the stock purchase. The court found that appellants, instead of identifying or producing a witness for deposition, simply suggested that the person or persons sought were either employed with Chase Manhattan Bank or the firm of Lazard Freres; appellants stated they intended to "subpoena someone from Chase Manhattan Bank next week" and invited appellees to attend the deposition, once it was scheduled. Finding this effort at compliance inadequate, and in light of appellants' prior attempts "to obstruct discovery," the court ordered that the unnamed Chase Manhattan Bank witness would not be deposed until appellants specifically identified those persons most knowledgeable about the issues specified in appellees' OCGA § 9-11-30(b)(1) notice. The court further ordered appellants to produce instanter those bank records which appellees had requested and identified by specific account number well over a year before, records which had been ruled discoverable and which should have been produced by February 28, 1998. Appellants were warned that failure to comply with the court's order would result in their being precluded from offering evidence on this issue.

On November 12, 1998, appellants wrote appellees and offered as a deponent a lawyer who had been involved in the SFTP stock purchase, but who had "no relevant documents in his possession." Moreover, this person was not available to be deposed until November 15, 1998, two days before trial. Most significantly, however, appellants failed to produce the requested bank records, arguing "there are no documents at Time Warner. There are no

documents apparently at Chemical or Chase. They have been destroyed either in the ordinary course of business or through other reasons." Appellees did not depose the offered witness since doing so without the requested documents would be futile. After a hearing on appellees' motion for sanctions, the trial court found that appellants "willfully obstructed and failed to comply with the Court's Order of November 10, 1998" and, as the court had warned it would do, precluded appellants from offering evidence on the flow of the Coca-Cola sponsorship fee funds.

Trial courts have broad discretion to control discovery, including the imposition of sanctions. *Daniel v. Corporate Property Investors*, 234 Ga.App. 148, 505 S.E.2d 576 (1998). Absent a showing of a clear abuse of discretion, a court's exercise of that broad discretion will not be reversed. *Id.* Pretermitting whether appellants identified a deponent responsive to the OCGA § 9-11-30(b)(1) request and therefore made a good faith effort to comply with that part of the court's order, it is clear to us that such a deposition, without reference to the requested documents, would have been of little value. More importantly, though, it plainly does not satisfy the court's express order to produce the requested records. Appellants previously produced bank records, including a "boxful" of bank records on one account, and yet they could not locate these particular records and offered no credible reason for that failure. In fact, the judge could infer from the documents and arguments presented at the hearing that appellants did not undertake a timely or thorough search for the requested records they claimed were destroyed even though they had had over a year to do so. That conclusion was justified when two weeks into trial, some of the requested records were inexplicably found and produced.

OCGA § 9-11-37(b)(2)(B) specifically authorizes the court to prohibit a disobedient party from "introducing designated matters in evidence." Given the court's findings, which are supported by the evidence, we cannot say this sanction was unwarranted or disproportionate. See *Heyde v. Xtraman, Inc.*, 199 Ga.App. 303, 308, 404 S.E.2d 607 (1991). We find no abuse of discretion. See *Tompkins v. McMickle*, 172 Ga.App. 62, 64(2), 321 S.E.2d 797 (1984).

(c) Appellants argue the trial court erred in allowing appellee to present evidence of "unrelated claims" or "unrelated bad acts," for example, that appellants withheld financial projections or planned to build a competing theme park. Pretermitting whether this evidence can be labeled "unrelated" in a suit alleging an intentional breach of fiduciary duties and of the partnership agreement's implied duties of good faith and fair dealing, appellants did not object to any of this evidence when it was offered. Error, if any, was not preserved for our review. See *MARTA v. Green Intl.*, 235 Ga.App. 419, 425-426(3)(b), 509 S.E.2d 674 (1998); see also *Frostgate Warehouses v. Cole*, 244 Ga. 782, 783, 262 S.E.2d 98 (1979).

Moreover, even if this evidence could be considered similar transaction evidence, it would be relevant to show appellants' motive, intent, or bent of mind. *Troncalli v. Jones*, 237 Ga.App. 10, 15-16(4), 514 S.E.2d 478 (1999). Appellees requested that a limiting instruction on similar transaction evidence be given, but appellants successfully objected to it and did not request one of its own. Appellants may not now complain that the trial court granted its request. See *Bone v. State*, 178 Ga.App. 802, 806, 345 S.E.2d 46 (1986).

(d) Appellants argue the trial court erred in admitting improper testimony from Salkin. Appellants cite to 17

excerpts from Salkin's testimony, arguing that he was allowed to give evidence that was either outside his personal knowledge or which constituted a legal opinion. We have reviewed those excerpts which were accompanied by specific and timely objection and find that Salkin's answers were based upon his personal knowledge and that he gave no improper opinion testimony or testimony which invaded the province of the jury. See OCGA § 24-9-65; *Ivy Inn v. MARTA*, 175 Ga.App. 580, 584(4), 334 S.E.2d 319 (1985). Further, any error was rendered harmless by the trial court's instruction to the jury that the credibility of witnesses and the weight of the evidence were for their determination. See *Phelps v. Huff*, 214 Ga.App. 398, 403(2)(b), 448 S.E.2d 64 (1994).

4. Appellants contend the trial court made statements in front of the jury which impermissibly impugned the credibility of defense witnesses. Of the eleven record citations referenced in appellants' brief, nine were the court's instructions to witnesses to answer counsel's questions with a "yes" or a "no" before giving an explanation. One statement was a reminder that the court must give permission before a witness is allowed to leave the witness stand. Appellants objected to none of these statements.

The only statement to which appellants interposed an objection was a statement made by the court that the jury "take notice of the fact" that testimony given by Bob Pittman was "evasive." The court interrupted the cross-examination of Pittman at a point where Pittman responded to a question asking if a purchase by a company named Boston Ventures of 51 percent of what TWE owned in a Six Flags organization had triggered his receipt of a sum of money pursuant to a contract. Pittman responded that his receipt of the money was "technically" not triggered by the purchase made by Boston Ventures because, "It could have

been anybody buying it would have triggered the contract," and therefore "It was not Boston Ventures that triggered it." The court interrupted at that point and began to question Pittman.

> THE COURT: Mr. Pittman, I usually just kind of sit over here and don't say much. The last colloquy that I heard went something like this, did Boston Ventures trigger your contract, you getting whatever you got, and you said technically, no, it could have been anybody; but it wasn't anybody. It was Boston Ventures, right?
>
> PITTMAN: That's correct.
>
> THE COURT: If it was Boston Ventures and if I know how to read and write, then who triggered your contract?
>
> PITTMAN: Boston Ventures.
>
> THE COURT: Amen. I'm going to give you another piece of advice. I want simple answers that an old Boy from Georgia can understand. I don't want anymore of this. Now, you know better than that. That, to me, is double-talk and you would not want me to be upset with you, trust me. Now, answer his question and I want you to answer it right the next time.
>
> PITTMAN: Yes sir.
>
> THE COURT: I'm going to ask the jury to take notice of the fact that this witness was evasive.

First, we conclude that the objected-to comment by the court was not an expression of opinion as to what facts had or had not been proved, therefore no reversal is required under OCGA § 9-10-7. Rather, the court expressed its opinion that the witness was not responding to the question

being asked and was being evasive. *Walker v. Bishop*, 169 Ga.App. 236, 242, 312 S.E.2d 349 (1983); *Simmons v. State*, 138 Ga. 137, 74 S.E. 1000 (1912). Moreover, we do not believe the court's statement commented on the credibility of the witness. Compare *Griffin v. State*, 142 Ga.App. 362, 363-364, 235 S.E.2d 724 (1977), vacated on other grounds, 240 Ga. 470, 241 S.E.2d 230 (1978); *Speagle v. Nationwide &c. Ins. Co.*, 138 Ga.App. 384, 385, 226 S.E.2d 459 (1976); *Carver v. Leach*, 53 Ga.App. 112, 115, 185 S.E. 155 (1936), in which we concluded that the courts' improper comments on the credibility of the witnesses in those cases required reversal. In *Griffin*, the court made statements which implied or expressed that the witness was lying. In *Speagle*, the court's statements that the witness was "equivocating" and "has changed her testimony once or twice" expressed an opinion that the witness was not being truthful. In *Carver*, the court not only stated that the witness was evading the questions but made additional statements implying that the witness knew the truth and was not telling it.

Although the foregoing cases, and particularly *Carver*, present a close question as to whether the court commented on Pittman's credibility, we conclude that the court's comment, taken in context, was not directed at Pittman's overall credibility as a witness, nor did it imply that Pittman was being untruthful. The court expressed its opinion that Pittman was being evasive by not responding directly to the particular question. See *Saladine v. State*, 169 Ga.App. 425, 313 S.E.2d 714 (1984). Accordingly, reversal is not required on the basis that the court expressed an opinion as to the credibility of the witness.

Although it was within the power of the court to exercise control over the witness to prevent unresponsive or evasive testimony, *Speagle v. Nationwide &c. Ins. Co.*,

138 Ga.App. 384, 226 S.E.2d 459, we nevertheless conclude that the objected-to statement made by the court to the jury was inappropriate and erroneous. See *Reed v. State*, 163 Ga. 206, 216, 135 S.E. 748 (1926). Under the circumstances, however, we find that the appellants have failed to demonstrate that the comment was harmful and requires reversal. Although Pittman was a key witness, the court's statement was limited in scope to a single response by Pittman on a minor point, and the statement did not disparage Pittman's credibility in general. Moreover, the court's final charge thoroughly and properly instructed the jury on witness credibility and informed the jury that nothing the court "did or said during the course of this trial" was intended to "intimate, hint or suggest to you which of the parties should prevail in this case." Under these circumstances, the error was harmless. *Reid v. Harbin Lumber Co.*, 172 Ga.App. 615, 619(2), 323 S.E.2d 845 (1984); see also *CSX Transp. v. Barnett*, 199 Ga. App. 611, 612(1), 405 S.E.2d 506 (1991) (both harm and error must be shown to warrant reversal).

5. (a) Appellants argue the evidence on the issue of compensatory damages was insufficient to allow the jury to calculate the amount of compensatory damages to Fund[6] within a reasonable degree of certainty. As we have held:

> As to damages, a jury must be able to calculate the amount of damages from the data furnished and it cannot be placed in a position where an allowance of loss is based on guesswork. A jury must be able to

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[6] Although appellants state that a portion of the $48 million in damages awarded Flags was based on speculation, they fail to support that assertion, offering argument which is pertinent only to the award of damages to Fund. Consequently, we deem this enumeration of error, as it applies to Flags, abandoned. Court of Appeals Rule 27(c)(2).

> calculate loss with a reasonable certainty. The party claiming damages carries not only the burden of proving the damages, but also furnishing the jury with sufficient data to estimate the damages with reasonable certainty. It is not necessary, however, that the party on whom the burden thus rests should submit exact figures. The rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, where proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted.

(Citations and punctuation omitted.) *CSX Transp. v. West*, 240 Ga.App. 209, 212-213(4), 523 S.E.2d 63 (1999).

In this case, experts for both sides were able to establish the value of the new partnership agreement to Fund at between $286 million and $300 million. Using appellants' own internal documents, appellees also were able to show a plan to under-invest in and thereby depress the value of the Georgia park. The evidence adequately demonstrated that the Georgia park did not receive capital improvements or maintenance comparable to appellants' wholly owned parks. Moreover, appellants documents revealed how much they typically invested in their wholly owned parks, following a "major/minor" plan for adding new attractions, thereby establishing a model for comparison. Using these documents and other information, appellees' expert on theme parks was able to calculate—using the multiple of EBITDA formula common to the industry—what an investor would have been warranted in investing in the

Georgia park had it been managed and invested in the same manner as comparable parks during appellants' tenure as general partner. That warranted investment was estimated at between $442 million and $458 million. Based upon this information, appellees' accountant opined that, as a result of appellants' misconduct, Fund lost between $142 and $172 million on the new partnership deal. This evidence was sufficient to allow the jury to calculate damages to Fund caused by appellants with reasonable certainty. See *CSX Transp. v. West*, 240 Ga.App. at 212-213(4), 523 S.E.2d 63; *Intl. Indem. Co. v. Regional Employer Svc.*, 239 Ga.App. 420, 422-423(4), 520 S.E.2d 533 (1999).

(b) Appellants also argue the award of compensatory damages to Fund and Flags was excessive. As shown above, the $149 million award to Fund was well within the range of evidence; consequently, we will not disturb it. See *Crawford v. Presbyterian Home*, 216 Ga.App. 54, 56(5), 453 S.E.2d 480 (1994); see also *Whitley v. Ditta*, 209 Ga.App. 553, 554-555(2), 434 S.E.2d 108 (1993).

Appellees also presented evidence showing that Flags was charged $4.8 million in improper inter-company allocations, that it was overcharged by $1.3 million for the Viper roller coaster, and that it never received its $2.8 million share of the Coca-Cola sponsorship fee. Flags also lost between $12 million and $15 million in income attributable to the delay in installing Batman the Ride. And, appellees presented testimony that appellants used Flags' share of the Coca-Cola money to acquire an interest in SFTP, which was sold at a substantial profit. Appellees' accountant determined that Flags' share of that return on investment amounted to $26.3 million. Appellees' accountant opined Flags lost, as a result of appellants' misconduct, over $50 million. Because the $40.8 million awarded to Flags was within the range of evidence, we will not

disturb it. *See Crawford v. Presbyterian Home*, 216 Ga.App. at 56(5), 453 S.E.2d 480.

6. (a) Appellants argue punitive damages were not authorized by the evidence because appellees proved no aggravating or outrageous circumstances or fraud. Punitive damages, however, are awardable in tort actions in which the plaintiff proves by clear and convincing evidence that a defendant's actions demonstrated "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." OCGA § 51-12-5.1(b).

Appellees presented evidence that TWE, SFTP, SFEC, and SFOG executives were aware of their fiduciary duty to appellees but consciously and intentionally disregarded that duty. As Bob Pittman tellingly stated, TWE was "not interested in being in the business of managing assets for others." Rather, it was in the business of putting together business deals that would profit the company. And, to accomplish that, the appellants withheld vital business information from Flags and Fund, undertook to compete with them, took money belonging to them, and carried out a plan to depress the value of their investment, the Six Flags Over Georgia Park. This evidence authorized the jury to find by clear and convincing evidence wilful misconduct that supported an award of punitive damages. We find no error. See *Elliott v. McDaniel*, 224 Ga.App. 848, 854(5), 483 S.E.2d 104 (1996), rev'd on other grounds, 269 Ga. 262, 497 S.E.2d 786 (1998); *Daniell v. Clein*, 206 Ga.App. 377, 383(3), 425 S.E.2d 344 (1992).

(b) Appellants argue that the trial court erred by failing to instruct the jury, "that the requisite separate finding that Defendants acted with 'specific intent to cause harm' [also] had to be proved by clear and convincing evidence." Ap-

pellants have cited no authority, and we have found none, requiring the court to give such a charge. The trial court properly charged the jury on the law pertinent to awarding punitive damages under OCGA § 51-12-5.1(b), including the requisite "clear and convincing evidence" burden of proof, and whether appellants acted with specific intent to cause harm. We find no error.

(c) Finally, appellants argue the punitive damages award was excessive under Georgia law.

"Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." (Citation and punctuation omitted.) *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 161, 164(1)(e), 473 S.E.2d 256 (1996); OCGA § 51-12-5.1(a). An award of punitive damages will not be disturbed on appeal unless it is "so excessive or inadequate as to shock the judicial conscience to the degree that a judgment entered thereon constitutes an error of law." (Citation and punctuation omitted.) *Wilson Welding Svc. v. Partee*, 234 Ga.App. 619, 620, 507 S.E.2d 168 (1998). The $257 million punitive damages award was roughly 1.3 times the $197 million in compensatory damages. Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury's award was infected by undue prejudice or bias. See *Southeastern Security Ins. Co. v. Hotle*, 222 Ga.App. 164(1)(e), 473 S.E.2d 256. Given a 1.3-to-1 ratio, we cannot say that the award was excessive as a matter of law. See *Hosp. Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614(1), 409 S.E.2d 501 (1991) (260-to-1 ratio upheld). We find no error.

Judgment affirmed.

ANDREWS, P. J., and RUFFIN, J., concur.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 00A725

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.,
Applicants,

v.

SIX FLAGS OVER GEORGIA, L.L.C., ET AL.,

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, the response thereto, and the reply,

IT IS ORDERED that the remittitur of the Court of Appeals of Georgia in case No. A00A0120, be stayed as to punitive damages pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court or further order of the Court.

/s/ Anthony M. Kennedy

Associate Justice of the Supreme Court of the United States

Dated this 1st Day
of March, 2001

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 001875

TIME WARNER ENTERTAINMENT COMPANY, L.P., ET AL.,
Petitioners,
v.
SIX FLAGS OVER GEORGIA, L.L.C., ET AL.,

ORDER

ON WRIT OF CERTIORARI to the Court of Appeals of Georgia.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Appeals of Georgia for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001).

IT IS FURTHER ORDERED that the petitioners Time Warner Entertainment Company, et al., recover Six Flags Over Georgia, et al., Three Hundred Dollars ($300.00) for costs herein expended.

October 1, 2001

Clerk's costs: $300.00

APPENDIX H

IN THE COURT OF APPEALS
STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., AND SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), AND GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

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* * *

Statement of Facts

The Partnership and the Park. The Six Flags Over Georgia theme park was operated from 1968 to 1997 by a Georgia limited partnership called Six Flags Over Georgia, Ltd. The Limited Partner in the Partnership was Plaintiff Six Flags Fund, Ltd., which was led by a tax attorney from California named Avram Salkin. (11/20/98 Tr 67-68) The General Partner was Defendant Six Flags Over Georgia, Inc.

The partners negotiated and agreed upon terms to govern their relationship, and set forth those terms in a written partnership agreement (the "Agreement" or "PA"). (DX 88) The Limited Partner was a completely passive investor; the Agreement provided that "[t]he General Partner shall have the exclusive control of the management of the business and affairs of the limited partnership". (PA Art. VII, ¶ 1)

Upon the termination of the partnership in 1997, the Limited Partner was to receive outright ownership of the Park, with all of its rides and other assets. (PA Art. XII)

Capital Improvements. The Agreement defined the General Partner's obligation to make capital improvements:

> "The General Partner . . . will cause the limited partnership in each calendar year beginning on or after January 1, 1971, to install and construct minimum Capital Improvements in the Amusement Park in an amount equal to the lesser of 10% of the Proceeds for the immediately preceding calendar year . . . or $800,000; provided that, if Capital Improvements actually made during any calendar year exceed the minimum amount herein specified, the excess difference between such minimum amount and the amounts actually expended may be carried forward for two subsequent years as a credit against the obligation of the General Partner to make such minimum Capital Improvements."

(PA Art. VII, ¶ 5) In each of the years at issue, from 1992 through 1997, the General Partner made well over the required $800,000 in capital improvements. (11/24/98 Tr 138, 144) In fact, capital improvements during that six-year period totalled $28.2 million, or almost six times the General Partner's obligation (6 years x $800,000/year). (12/7/98 Tr 179-80; DX 422, 734)

In making capital improvements decisions, the Agreement gave the General Partner sole discretion over the selection of rides and other attractions. (PA Art. III(b))

Management of the Park. From December 1991, the General Partner was owned by Six Flags Theme Parks Inc. ("SFTP"). SFTP was owned by Six Flags Entertainment Corporation ("SFEC"), which at the relevant time was itself owned 49% by Time Warner Entertainment Company, L.P. ("TWE") and 51% by institutional investors. (Defendants SFTP, SFEC and TWE are the "Non-Partner Defendants".)

Under Robert Pittman, the CEO of SFEC from December 1991 to May 1995 (12/8/98 Tr 60-61), the Park tried to broaden its appeal by installing family attractions as well as thrill rides (like roller coasters). (12/8/98 Tr 85-87) This strategy was extremely successful, as the Park achieved record attendance and profit levels. (12/7/98 Tr 175-84)

The phenomenal performance of the Park under Defendants' management was reflected in the investment return to the Limited Partner's investors. Each of the 100 unit-holders made a single capital contribution of $31,700 (R 16110-19) and, in return, ultimately received more than $580,000 in cash distributions (much of which was tax-free) and an interest in a new partnership agreement that Plaintiffs' financial advisor valued at $300,000,000. (Id.; PX 1155; 11/24/98 Tr 159)

Until April 1995, the Limited Partner never—over the course of more than 25 years—made a single suggestion or demand regarding what capital improvements should be made. (11/24/98 Tr 190-92; 12/8/98 Tr 95-96) Consistent with the terms of the Agreement, the Limited Partner left those decisions to the General Partner and reaped the

financial rewards of the General Partner's successful efforts.

Negotiations over a New Partnership. From 1992 to 1994, Mr. Salkin, who acted for the Limited Partner, negotiated with Defendants over the form of a new business relationship to follow the termination of the existing Partnership at the end of 1997. Notably, during this period the Limited Partner consistently sought to *hold down* the level of capital improvements to avoid adverse tax consequences. For example, Mr. Salkin advised Mr. Pittman that the Limited Partner did "not want to become burdened with" high spending on capital improvements. (11/24/98 Tr 162-66; DX 437) And, when the parties reached a tentative agreement on a new 30-year partnership in December 1994, the Limited Partner sought a contractual *ceiling* on capital improvements. (11/24/98 Tr 176-78)

The Limited Partner Demands Installation of Batman the Ride. In April 1995, Mr. Pittman for the first time mentioned Batman the Ride to Mr. Salkin. (11/24/98 Tr 249-53; 12/8/98 Tr 118) Shortly afterward, the tentative new agreement fell apart. Seeking leverage in the ongoing negotiations, the Limited Partner then claimed it was the General Partner's fiduciary duty to install Batman the Ride, which cost over $9 million, for the 1996 season, just two years before the Limited Partner was to take over the Park.

Defendants told Mr. Salkin they had no legal duty to install Batman the Ride because the General Partner had far exceeded the capital improvements obligation in the Agreement each year. (12/8/98 Tr 264-65; 12/9/98 Tr 9-10) Also, the General Partner believed that installing the Batman ride in 1996 would be unwise because the Atlanta Olympic Games would divert attendance from the Park (as in fact they did, even more than expected), preventing the

Partnership from recouping an investment in the ride. (12/3/98 Tr 203-06; 12/9/98 Tr 5-7) Mr. Salkin "concurred" in the decision not to install Batman the Ride in 1996. (11/25/98 Tr 18-19; 12/9/98 Tr 13-16; DX 538)

Seeking further leverage, Mr. Salkin instructed his accountants to examine SFTP's financial records (11/30/98 Tr 71-73), to which Defendants gave full access (12/7/98 Tr 110-21). The Limited Partner then made claims of breach of fiduciary duty regarding (i) the handling of proceeds in 1991 from a nationwide Six Flags sponsorship agreement with Coca-Cola, (ii) the transfer of the "Viper" roller coaster from another SFTP theme park to the Park for the 1995 season, and (iii) charges, known as "intercompany allocations", for services SFTP provided to the Partnership.

The Auction. In 1996, the Limited Partner's financial advisor (the Wall Street investment bank Goldman Sachs) and its lawyers (the Los Angeles firm of Gibson, Dunn & Crutcher) held an auction among theme park companies for the right to manage the Park after the existing Partnership expired. As a condition to allowing Defendants even to take part in the auction, the Limited Partner demanded, among other things, that Batman the Ride be installed for the 1997 season. Defendants acceded to that, and the Limited Partner's other demands, to be permitted to bid. (11/25/98 Tr 27-28; 12/9/98 Tr 28-30; 12/10/98 Tr 12-14)

Defendants were the highest bidder, but the Limited Partner falsely told them there was a higher bid, thereby inducing Defendants to increase their bid by $30 million. (12/9/98 Tr 62-65, 113-17) The Limited Partner accepted that offer and entered into a new partnership with Defendants—a deal Plaintiffs characterized (in a document excluded by the court) as a "grand slam plus" (R 6308-09). However, the Limited Partner reserved the right to assert

claims against Defendants on behalf of itself and the Partnership.

Proceedings in the Trial Court

Faced with the Limited Partner's reservation of rights, and in the belief that judicial interpretation of the Agreement would resolve any potential claims, the General Partner and SFTP filed a declaratory judgment action in the Superior Court of Gwinnett County, where Plaintiff Six Flags Over Georgia, LLC was registered, on March 19, 1997. (R 6-12) The Limited Partner and the other Appellees here filed counterclaims and added SFEC and TWE as Defendants. (R 14-40, 41-77) Upon Plaintiffs' petition, the trial court realigned the parties. (R 14-40, 222-24) The General Partner moved for partial summary judgment because it had complied with its obligations under the Agreement, and the Non-Partner Defendants moved to dismiss all claims because they were not partners. (R 528-51, 556-99) The court denied both motions without opinion. (R 1330-33)

Before trial, Plaintiffs moved to exclude numerous items of evidence central to Defendants' case. (R 10500-900, 11061-67, 11240-369) The court referred those motions to a special master, despite Defendants' limited consent to a master for discovery disputes only. (R 5092-93) The court accepted the master's recommendation to grant *all* of Plaintiffs' *in limine* motions (R 15399-412, 15571-82), even though the master had issued the recommendations without even *reading* Defendants' briefs (R 15548-49). Plaintiffs also created a discovery dispute that led to the preclusion order relating to the sponsorship agreement. (R 16037-38)

The case was tried to a jury from November 17 through December 21, 1998. On the eve of trial and at the close of evidence, Plaintiffs abandoned their fraud, conspiracy to

breach contract and certain breach of contract claims. (R 13140-48, 15657, 16345; 12/16/98 Tr 81-86) Plaintiffs also announced that they were not asserting claims for various conduct pleaded in their complaint and pressed vigorously at trial. (R 228-59, 13144-48; 12/16/98 Tr 109-10) Defendants' motion for a directed verdict on the remaining claims was denied. (R 16248-314; 12/16/98 Tr 114-15) The claims submitted to the jury were: (i) the Limited Partner's claim for breach of fiduciary duty with respect to capital improvements and (ii) the Partnership's claims for breach of fiduciary duty (based on capital improvements, the Coca-Cola sponsorship contract, intercompany allocations and the Viper ride), conversion and breach of contract.

On December 18, 1998, the jury returned a verdict for Plaintiffs on their fiduciary duty claims, and awarded $197,296,000 in compensatory damages ($149,175,000 to the Limited Partner and $48,121,000 to the Partnership). (R 16384-89) After the punitive damages phase, on December 21, the jury awarded Plaintiffs $257,000,000 in punitive damages, of which three-quarters was awarded to the Limited Partner. (R 16391-94) Only $1 million of this punitive damages award was rendered against the General Partner; the rest was against the Non-Partner Defendants (including $245 million against TWE alone). The court entered final judgment that same day. (R 16395-98)

Defendants moved in a timely manner for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. (R 16443-48, 16507-622) On April 22, 1999, the trial court denied Defendants' motion. (R 18007-09)

Appellants preserved their enumerations of error by the following methods: motion for a directed verdict (R 16248-314), objections to the jury charge and submission of proposed jury changes (R 15660-766, 16094-109,

16120-52, 16153-74; 12/17/98 Tr 243-52; 12/21/98 Tr 169-71), oppositions to Plaintiffs' motions to preclude evidence or argument (R 13473-4190, 15632-47, 15863-910, 11/17/98 Tr 11-21), offers of proof (R 16062-69, 16110-19, 16217-30, 12/2/98 Tr 53-85), motion to compel production (R 6410-50), contemporaneous objection to trial errors (as noted *infra*), and motion for JNOV or new trial (R 16443-48, 16507-622)

* * *

Enumeration of Errors

1. The trial court erred by failing to grant Defendants judgment on Plaintiffs' capital improvements claim because the Partnership Agreement defined Defendants' obligation and specifically authorized their conduct.

2. The trial court erred by giving improper jury charges on breach of fiduciary duty and failing to give Defendants' proposed charges.

3. The trial court erred by failing to grant judgment in favor of the Non-Partner Defendants, which owed no fiduciary duty to Plaintiffs.

4. The trial court erred by excluding evidence critical to the defense.

5. The trial court erred by precluding Defendants from offering any evidence or argument on the Partnership's claim regarding the Coca-Cola sponsorship agreement.

6. The trial court erred by impugning the credibility of Defendants' witnesses in front of the jury.

7. The trial court erred by allowing the jury to consider prejudicial evidence of conduct unrelated to the claims submitted to the jury.

8. The trial court erred by permitting Plaintiffs to introduce improper testimony.

9. The trial court erred by failing to grant Defendants judgment because the evidence did not support Plaintiffs' fiduciary duty claims.

10. The trial court erred by failing to strike Plaintiffs' compensatory damages as speculative.

11. The trial court erred by failing to strike or reduce Plaintiffs' compensatory damages as excessive.

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

* * *

VII. THE TRIAL COURT ERRED BY FAILING TO SET ASIDE THE PUNITIVE DAMAGES AWARD.

A. *Defendants Are Entitled to Judgment on Liability for Punitive Damages.*

The jury awarded Plaintiffs over a quarter of a *billion* dollars in punitive damages—by far the largest award in Georgia history. As a matter of law, punitive damages are not authorized on these facts.

Section 51-12-5.1 of the Georgia Code provides that Plaintiffs had the burden of proving "by *clear and convincing evidence* that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences".

O.C.G.A. § 51-12-5.1(b) (emphasis added). Plaintiffs did *not* meet their burden. This case did not involve "circumstances of aggravation or outrage", *Tri-County Inv. Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 638, 500 S.E.2d 22, 27-28 (1998), or fraud, *see Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168, 170 (1998) (refusal to award punitive damages appropriate where there was no "significant amount of fraud"). Plaintiffs tacitly conceded as much by withdrawing their fraud claim before trial. (R 13140-48) No conceivable reading of the record can support a finding by clear and convincing evidence that Defendants' alleged misconduct rose to the requisite level for punitive damages.

B. *The Trial Court Failed to Instruct the Jury on the Standard of Proof for Specific Intent to Harm.*

The trial court also erred by failing to instruct the jury, as Defendants requested, that the requisite separate finding that Defendants acted with "specific intent to cause harm" had to be proved by clear and convincing evidence. (R 16379; 12/21/98 Tr 112) By statute, punitive damages are capped at $250,000 for each plaintiff unless the jury makes a separate finding of specific intent to harm. O.C.G.A. § 51-12-5.1(f), (g); *Bagley v. Shortt*, 261 Ga. 762, 763, 410 S.E.2d 738, 739 (1991). Because of the extraordinary nature of punitive damages, findings supporting punitive damages must meet the more rigorous clear-and-convincing standard of proof. O.C.G.A. § 51-12-5.1(b). The failure to instruct the jury on the standard of proof for the specific-intent finding was *per se* reversible error. *Hammett v. Reynolds*, 243 Ga. 669, 671-72, 256 S.E.2d 354, 356-57 (1979).

C. *The Punitive Damages Are Excessive.*

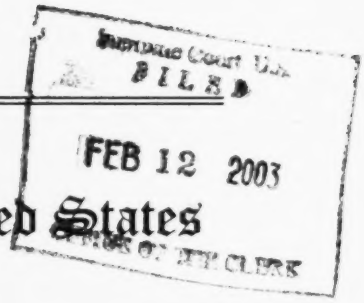
Finally, the $257 million punitive damages award is excessive and must be set aside or reduced. *See* O.C.G.A.

§ 51-12-12(a). This award is over *30* times larger than the largest punitive damages award ever paid in this state—the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system. *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Here, the $257 million was awarded primarily because Defendants installed a roller coaster three years later than Plaintiffs wished. This award violates the Excessive Fines Clause of the Georgia Constitution because, as in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988), there is no "sensible relation between punishment and offence". *Id.* at 119-20, 365 S.E.2d at 831. Notably, Defendants' conduct involved no "personal injury or death" (or even a *risk* of injury or death). *Id.* at 122, 365 S.E.2d at 833. The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here "was purely economic in nature", and Defendants' conduct "evinced no indifference to or reckless disregard for the health and safety of others". *Id.* at 576.

* * *

No. 02-978



In The
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,

Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Six Flags Over Georgia, LLC ("Flags"), Six Flags Fund, Ltd. (L.P.) ("Fund"), and George DeRoy, as Trustee of Six Flags Claims Trust, state the following:

Respondent Fund owns 99% of the membership interests in Respondent Flags. No publicly held company directly owns 10% or more of the membership interests in Flags.

Respondent Fund is a limited partnership. Its managing general partner is the Salkin Family Trust, created by declaration of trust dated May 15, 1980, Avram Salkin and Dorothy Salkin, co-trustees. The only corporate general partner of Fund is SFG, Inc., a California corporation, which is the non-managing general partner and owns a 0.1% partnership interest in Fund. SFOG Acquisition A, Inc. owns a 17.1% special limited partnership interest in Fund, and SFOG Acquisition B, L.L.C. owns an 8.2% special limited partnership interest in Fund. Upon information and belief, Six Flags Inc. (formerly known as Premier Parks Inc.) and AOL Time Warner Inc. may directly or indirectly own some or all of SFOG Acquisition A, Inc. and SFOG Acquisition B, L.L.C. AOL Time Warner Inc. and Six Flags Inc. are publicly held.

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BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

Respondents Six Flags Over Georgia, LLC ("Flags"), Six Flags Fund, Ltd. (L.P.) ("Fund"), and George DeRoy, as Trustee of Six Flags Claim Trust, respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Petition does not accurately describe the Court of Appeals' opinions and the record evidence. Petitioners assert that the ten-judge "Whole Court" of the Georgia Court of Appeals unanimously "defied" this Court's GVR by holding on remand that Petitioners' due process challenge to the size of the punitive damages award had been abandoned under Georgia's appellate rules. Pet. 2. Petitioners label this state law holding as "pretext" and "entirely imaginary." Pet. 13, 17. Petitioners then claim that the Georgia Supreme Court violated its own rules by declining to review this state law finding. Pet. 21. In truth, as the opinion below reveals, the abandonment holding was based upon Petitioners' failure to preserve the issues under well-established rules of appellate procedure promulgated in 1965 and enforced regularly thereafter. It is Petitioners' characterization of this case and assertions of "defiance" that are "entirely imaginary."

Petitioners' exaggerations perhaps result from recognition that this express abandonment holding by the Georgia Court of Appeals is an adequate and independent state law ground for affirmance that deprives this Court of jurisdiction.

Even though Petitioners' failure to preserve any constitutional challenge was dispositive, the Court of Appeals alternatively conducted the very *de novo* review of the *BMW v. Gore* factors that Petitioners now claim never occurred. *Compare* Pet. App. 12a, 12a-16a (Court of Appeals: "we also review the punitive damages award *de*

novo and apply the *Gore* guideposts") *with* Pet. 13 (Petition: "the court refused to conduct the *de novo* review required by federal law and dictated by this Court's GVR."). In its thorough analysis, the Court of Appeals concluded: "[a]pplying a *de novo* standard of review and weighing the *Gore* guideposts, we find that the award of punitive damages under these circumstances does not violate appellants' federal due process rights." Pet. App. 16a. Contrary to Petitioner's hyperbole, those findings are not defiant, novel or incorrect. Indeed, given that the punitive damages award in this intentional tort case was only 1.3 times the amount of the actual damages, the Court of Appeals' holding is not remotely remarkable, and certainly nothing that warrants review by this Court.

Petitioners also claim to be victims of a unanimous Georgia jury and unanimous Georgia trial and appellate judges because they were supposedly "big out-of-state companies" and Respondents were "local interests." Pet. 1-2. Again, the truth is quite the opposite. *Petitioners themselves chose the venue for this suit* when they sued Respondents in state court in a suburb of Atlanta, Georgia, resulting in the assertion of *counterclaims* by Respondents. Petitioners chose that forum to adjudicate this dispute *because* Petitioners – all subsidiaries of what was Time Warner Inc. – are not truly out-of-state companies. Time Warner Inc.'s CNN, TBS, TNT, Cartoon Network, Turner Entertainment, Atlanta Braves, Atlanta Hawks, and Atlanta Thrashers operations (among others) are headquartered in Atlanta, Georgia. Petitioners' corporate representative at trial was an Atlanta resident, and their main witness in the punitive damages phase of the trial was Ted Turner, an Atlanta icon and the largest individual shareholder and Vice-Chairman of the Board of Time Warner Inc.

By contrast, Respondent DeRoy and the managing General Partner of Respondent Fund are from California

and the corporate general partner of Fund was a California corporation. The trial representative and primary witness for Respondents was a resident of Los Angeles, as the Georgia jury was informed. Petitioners lost this case on the merits because of the overwhelming evidence that they cheated their partners – not because they were "out-of-state companies."

Petitioners' recitation of the record evidence similarly differs so substantially from the record and the appellate opinions that it might as well be describing an entirely different case. As the Court of Appeals twice held, the record evidence in *this* case demonstrates that Petitioners "consciously and intentionally disregarded" their fiduciary duties to Respondents when Petitioners "carried out a plan to depress the value" of the Six Flags Over Georgia amusement park "by under-investing in it and then withholding information so that [they] could acquire the park at a discount." Pet. App. 55a, 33a. This was a "scheme to devalue their partners' investment for their own benefit" and "a premeditated plan surreptitiously executed over a period of years. . . . the very definition of 'reprehensible.'" Pet. App. 13a-14a. As a result of that "especially reprehensible" intentional tort, the jury, which found that Petitioners had *specifically intended to harm* their partners, imposed a punitive damages award that reflected the scale of Petitioners' wrongdoing but was *only 1.3 times* the now admitted and paid compensatory damages. Pet. App. 12a, 22a & n.3.

The Court of Appeals affirmed, "[a]fter closely scrutinizing over 80 volumes of record and transcript." Pet. App. 13a. After GVR to consider the effect of *Leatherman*, the whole court (ten judges) of the Court of Appeals again unanimously affirmed, concluding that

> "[G]iven the amount of intentional economic damage inflicted by the appellants, corporate entities with collective assets measured in billions of dollars, we believe the award of punitive damages

> was reasonably calculated to punish them and to deter such conduct in the future."

Pet. App. 15a.

Petitioners' alternative request for another GVR is no better than their argument for reversal. The pendency in this Court of *State Farm v. Campbell* affords no reason to GVR this case again. The extraterritoriality arguments that dominate *Campbell* are not at issue here.[1]

JURISDICTION

As discussed fully in the Reasons for Denying the Writ (*see infra* pp. 13-21), this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the federal questions Petitioners now raise were not presented to or decided by the Court of Appeals in the first instance, and were waived and abandoned under state law, as the Georgia Court expressly held. Resp. App. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of federal and Georgia statutes and of the United States Constitution are reproduced at Resp. App., *infra*, 1a-12a.

STATEMENT OF THE CASE

Unlike Petitioners' statement, which relies for "factual support" largely on citations to a brief *Petitioners* filed

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[1] Petitioners concede that *Campbell* is different from this case because "*State Farm* also presents an 'extra-territoriality' issue," (Pet. 25) which is absent from this case. In fact, even the allegedly common (but waived) "*BMW* guidepost" issues in this case are vastly different than those presented in *Campbell*, as described *infra* at 29-30.

below (Pet. App. 60a-70a),[2] the following statement is fully supported by citations to the opinions of the Court of Appeals and the trial record.

1. Between 1991 and 1997, Petitioners flagrantly abused their positions as general partner (or entities controlling that partner) of the Six Flags theme park in Atlanta, Georgia,[3] by engaging in various intentional, wrongful acts in clear contravention of the fiduciary duties they owed to their partners. At the heart of Petitioners' scheme was a plan to depress "the value of the park by under-investing in it and then withholding information so that it could acquire the park at a discount" once the partnership agreement between Petitioners and Respondents ended in 1997. Pet. App. 33a. The evidence showed a "scheme to devalue their partners' investment for their own benefit," "a premeditated plan surreptitiously executed over a period of years," and an "intentional breach of its fiduciary duty [that] revealed a callous indifference to the financial well-being of its limited partners" through conduct that was "deceitful, self-serving and financially damaging" and "especially reprehensible." Pet. App. 12a-14a.

Secret internal memoranda and presentations revealed that Petitioners consciously planned to "milk" the Georgia park by decreasing capital expenditures as the partnership agreement approached expiration. Pet. App. 29a.[4] Petitioners assert that they were required by the

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[2] Page limitations defeat any attempt to list, much less debunk, all of Petitioners' factual misstatements.

[3] The park was owned by Flags, a limited partnership. Petitioners were the general partner of Flags and entities that owned and controlled that general partner and were making the decisions for Flags. Fund was the sole limited partner of Flags.

[4] Time Warner states that it "satisfied its contractual duty to *invest* $800,000 per year," suggesting that capital improvements were made with Petitioners' funds (Pet. 7), but "all capital expenditures" in fact

(Continued on following page)

partnership agreement to invest only $800,000 per year in capital improvements to the park, but the Court of Appeals explicitly rejected that interpretation of the partnership agreement as a matter of state law.[5] As the Court of Appeals explained, not only did Petitioners' devious strategy constitute an objective violation of Petitioners' fiduciary "duty to act in good faith in making [capital improvement] decisions," but "the evidence shows that [Petitioners themselves] *never interpreted* the capital expenditures provision to mean they only had to invest $800,000 per year." Pet. App. 37a, 40a (emphasis added). To the contrary, Petitioners' top officer acknowledged and recognized that Petitioners had a duty to "maximize the performance" of the park. Pet. App. 40a.

A clear illustration of Petitioners' scheme was their calculated decision, shown by their own 1995 confidential memorandum, to delay the installation of "Batman the Ride" in order to reduce Respondents' "leverage in negotiating with other potential strategic partners in 1998 and beyond." Pet. App. 30a. Starving the park of capital expenditures, *such as* the Batman ride, depressed the park's value by almost $150 million, inducing weak offers from competing bidders. This allowed Petitioners to secure the park at a lower price in 1997. Pet. App. 29a-32a, 53a-54a.

The damage to Petitioners' partners was severe. The jury awarded approximately $149 million on the claim that Petitioners intentionally drove down the value and

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"[came] from the park's [*i.e.*, Respondent Flags'] surplus operating cash." Pet. App. 26a.

[5] There was also no evidence supporting Petitioner's argument about this "$800,000" provision. Indeed, the contrary testimony of Respondent's witness Salkin, who negotiated the partnership agreement, was uncontradicted. Simply put, "minimum" does not mean "maximum", as it must for Petitioners to have prevailed.

the prospective purchase price of the park.[6] The size and evidentiary support for this compensatory damages award cannot be challenged in this Court because Petitioners paid that award in full after losing on appeal below. Pet. 9. Nevertheless, Petitioners claim that "respondents have never explained how the installation of a $9 million ride could somehow increase the value of the Six Flags park by $150 million overnight." Pet. 20. First, that is a gross misstatement of this part of Respondents' damages claim. Pet. App. 26a-31a. Second, the devaluation claim was explained repeatedly at trial, through several expert witnesses. The Court of Appeals recognized that the mechanics of the valuation were relatively straightforward, as "[c]apital investment in an amusement park, especially in major thrill rides, fuels EBITDA (*i.e.*, "earnings before interest, taxes, depreciation, and amortization") growth, which in turn increases the value of the park." Pet. App. 29a. For example, the Batman ride was the most successful capital expenditure in the history of the Six Flags parks and had driven up EBITDA by 37 to 54 percent in the first year after it was installed at Time Warner's wholly owned parks in Chicago, New Jersey, Los Angeles, and St. Louis. Pet. App. 30a; PX 817 at 2; PX 970; PX 484 at 8. Amusement parks are valued, bought, and sold at a multiple of EBITDA, thus multiplying the effect of capital expenditures on value. Pet. App. 29a. This evidence flatly discredits the continued suggestion that appropriate capital expenditures – which were not limited to the Batman ride – could not boost the park's value by almost $150 million.

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[6] *See* Pet. App. 29a-32a, 53a-54a (Court of Appeals discussions of how withheld capital expenditures resulted in the figure for decreased park value awarded by the jury).

In addition to depressing the value and earnings of the park, Petitioners actively sabotaged Respondents' attempt to conduct a competitive auction for the park, chilling the interest of other bidders and inducing weak bids, by withholding and distorting financial information necessary to allow other prospective bidders to value the park accurately. Pet. App. 30a-31a; *see also* PX 20 (internal instructions to be "niggardly" in responding to Fund's requests for financial information and to "flatten out" projections). In violation of their fiduciary duties to Respondents, Petitioners bought land "immediately adjacent" to the park, "thus limiting the park's expansion opportunities" (Pet. App. 25a-26a); they used "confidential business information" from the park to "stud[y] the feasibility of developing a competing park" (Pet. App. 26a); they signed employment contracts including non-competition clauses with "key park executives" that would become effective after the partnership ended (Pet. App. 27a); and they "deferred" substantial maintenance and failed to make $7 to 10 million of "basic repairs" (*ibid.*). Petitioners' malevolent role in this process (most of which was revealed only by this litigation) undercuts any suggestion that Respondents voluntarily accepted Petitioners as "their fiduciary for another 30 years."[7] Pet. 6.

In operating the Park, Petitioners missed no opportunity to profit at the expense of their partners. They charged more than $4 million of luxury expenses to the partnership in violation of the partnership agreement; they overcharged the partnership by almost $1.4 million for an obsolete minor attraction that was installed instead

[7] Petitioners' scheme worked: Fund had no viable alternative to signing a new management contract with the Petitioners as high bidder. Pet. App. 25a, 28a. However, one of the express conditions of this new contract was the preservation of Flags' and Funds' claims against Petitioners. Pet. App. 28a; PX 719.

of the EBITDA-boosting Batman ride; and they surreptitiously took a $2.8 million sponsorship fee from Coca-Cola and used it to finance Petitioners' investment in the Six Flags Parks chain, reaping a $26.3 million windfall for Petitioners *from a partnership asset*. Pet. App. 32a, 54a.[8]

Contrary to Petitioners' assertion that their conduct was "barely even tortious" (Pet. 17), the Court of Appeals found it was "especially reprehensible" (Pet. App. 12a) and that Petitioners were "aware" they owed a fiduciary duty to Respondents "but consciously and intentionally disregarded that duty," Pet. App. 55a.

2. This lawsuit was originally filed by Petitioner Six Flags Theme Parks Inc. (a subsidiary of Petitioner Time Warner Entertainment Company, L.P.), and Flag's general partner, Petitioner Six Flags Over Georgia, Inc. Pet. App. 28a. *Petitioners – not Respondents – chose Gwinnett County, Georgia as the forum.* The trial court realigned and added parties. *Ibid.* After a six-week trial, the jury found all four Petitioners liable, awarding $197.3 million in compensatory damages. The jury found by special interrogatory that each Petitioner had acted with "specific intent to harm" and imposed $257 million in punitive damages, a ratio of only 1.3 to 1. Pet. App. 22a & n.3.

In their initial appeal, Petitioners made only a vague and cursory challenge to the constitutionality of the

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[8] Contrary to Petitioners' assertion that "the trial court suppressed evidence that the parties' purpose in entering the partnership was to create a tax shelter" (Pet. 7 n.5), Petitioners "presented their own expert testimony covering those points" and cross-examined Respondents' chief witness about them. Pet. App. 43a-44a. Petitioners also refer to excluded "evidence" that "plainly" shows the Coca-Cola funds were not used to finance the Six Flags acquisition (Pet. 7 n.5), but the Court of Appeals affirmed the exclusion of that alleged proof because Petitioners "plainly" violated a court order to produce the information. Pet. App. 47a.

punitive damages award. Their argument for constitutional excessiveness consumed only two sentences of their 60-page appellate brief. They cited *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), but solely as limiting the amount of punitive damages in cases involving "purely economic" harm, and *made no mention at all* of *any* of the *BMW* guideposts, even though the third guidepost argument forms the basis for Question 2 of their current Petition in this Court.[9] Resp. App. 14a.

3. The Court of Appeals affirmed. Nearly half of the court's 49-page opinion carefully documented and explained the calculated and outrageous nature of Petitioners' conduct. *See* Pet. App. 21a-34a, 37a-41a, 52a-56a. The Court of Appeals concluded that Petitioners had engaged in "willful misconduct," delineating instances in which Petitioners "took money belonging to [Respondents]," "kept secret profits derived from the sale of a partnership asset," and "engaged in self-dealing conduct that specifically harmed [Respondents]." Pet. App. 55a, 33a. The court also took into account the extremely low ratio – 1.3 to 1 – of punitive to compensatory damages, but explained that it did "not mechanically look to the ratio." Pet. App. 56a.

In its initial opinion, the Court of Appeals said nothing about *BMW's* third guidepost or anything about *BMW* at all. *Ibid.* This is because Petitioners *never asked* that court to perform an analysis under the third or any other guidepost.

The Court of Appeals rejected Petitioners' argument that Georgia law did not recognize a claim for aiding and abetting a breach of fiduciary duty. The Court of Appeals found that Petitioners had "conceded" the existence of "an aiding and abetting theory of liability" by submitting jury

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[9] Petitioners' Reply Brief similarly devoted only two sentences to conceivably federal issues. *See* Resp. App. 16a.

charges on the aiding and abetting theory and by failing properly to enumerate as error on appeal the finding of liability on that ground. Pet. App. 34a-36a. After considering the substance of Petitioners' argument, the court noted that "[w]ere we required to address this issue," it would have affirmed. *Ibid.* Because of Petitioners' failure to comply with state procedural rules, however, the court concluded that it "lacks the jurisdiction to consider" it. Pet. App. 36a.

After affirmance, Petitioners filed a motion for reconsideration with the Court of Appeals, in which they again failed to raise any of the questions presented in their current Petition. With respect to the alleged excessiveness of the punitive damages, Petitioners included only a citation to *BMW* but offered nothing about its potential relevance or its "guideposts." Resp. App. 19a.

4. After the Court of Appeals denied their Motion for Reconsideration, Petitioners sought a discretionary grant of certiorari from the Georgia Supreme Court, which was denied. Pet. 9.

5. Petitioners sought certiorari from this Court and, alternatively, a GVR in light of *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). On October 1, 2001, this Court granted a GVR in light of *Cooper*. Pet. App. 59a.

6. On remand, the Georgia Court of Appeals asked for re-briefing and re-argument. On March 29, 2002, the whole (ten judge) Court of Appeals unanimously affirmed. The Court held that Petitioners had abandoned their alleged federal constitutional challenges under well-established Georgia law and procedural rules. Nevertheless, the Court of Appeals conducted a thorough *de novo* review under *BMW*. In that review, the Court stated:

> "[A]lthough the harm to Flags and Fund was primarily economic, it was caused by conduct we

> find *especially reprehensible*. Appellants' intentional breach of its fiduciary duty revealed a callous indifference to the financial well-being of its limited partners and their individual investors. *After carefully scrutinizing over 80 volumes of record and transcript* during the first appeal, we found that the evidence adduced supported the jury's conclusion that appellants acted in concert to breach SFOG's fiduciary duty to its business partners. Six-and-a-half pages of our [prior] published opinion are dedicated to describing appellants' scheme to devalue their partners' investment for their own benefit."
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> "Appellants' conduct toward its partners and those who invested in the limited partnership was part of a *premeditated plan surreptitiously executed over a period of years*. Appellants' conduct was deceitful, self-serving, and financially damaging. More importantly, however, appellants' conduct was a breach of fiduciary duty, a violation of a confidential relationship of trust requiring the utmost in good faith."
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> *"Appellants' conduct was, in short, the kind of behavior we find 'deserving of reproof, rebuke, or censure; blameworthy' – the very definition of 'reprehensible.'"*

Pet. App. 12a-13a (emphasis added).

With respect to Petitioners' belated third guidepost argument, the Court of Appeals identified several Georgia statutes imposing double or treble penalties for "comparable corporate misbehavior." Pet. App. 16a. Because the punitive damages here were only 1.3 times compensatory damages, the court held that those statutes provided "fair notice not only of the kind of conduct that would subject them to punishment, but also of the severity of the penalty that might be imposed." *Ibid.*

Petitioner sought a discretionary grant of certiorari from the Georgia Supreme Court. The Georgia Supreme Court denied the petition, and denied the motion for reconsideration. Pet. App. 17a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ABANDONMENT OF THEIR FEDERAL DUE PROCESS CHALLENGE IS AN ADEQUATE AND INDEPENDENT STATE GROUND DEPRIVING THIS COURT OF JURISDICTION

This Court will not review judgments of state courts that rest on adequate and independent state law grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this context, an adequate and independent state ground doctrine is jurisdictional, because, if the state law determination is sufficient to sustain the judgment, "any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997).

Thus, where, as here, a state court indicates with "requisite clarity" that petitioner's claims were rejected on state law grounds, this Court will refuse to address the federal claim supposedly raised below. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). "[R]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide" such cases. *Michigan v. Long*, 463 U.S. at 1040.

The alternative holding rejecting Petitioners' federal due process claim on the merits does not affect this analysis. "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the] jurisdiction [of this Court] fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

A. The Abandonment Rule Is Well-Established And Regularly Applied

To preserve a claim of error in the Georgia appellate courts requires two steps: (1) identifying the claim of error in the "Enumeration of Errors" (Rule 27(a)(2)) and (2) providing meaningful argument, supported by legal authority and citation to record evidence, for each enumeration of error. Rule 27(c)(2)-(3). Resp. App. 1a-3a. Petitioners failed on all counts as to any allegation of federal constitutional excessiveness.

Petitioners did not include constitutional excessiveness as an enumeration of error at all, and they devoted only two sentences of a 60 page brief to the issue. Pet. App. 11a-12a.[10] Petitioners' initial appellate brief did not mention, *inter alia*: the first guidepost of *BMW*; the second guidepost of *BMW*; the third guidepost of *BMW*; their new argument that treble damages statutes cannot satisfy the third guidepost; their new argument that alleged infirmities in the compensatory award rendered the punitive award excessive; or their new argument that a comparison to other punitive damages cases was required. Under Rule 27 of the Georgia Court of Appeals, the finding of waiver was not only entirely proper: it was *inescapable*.

Originally adopted in 1965, Court of Appeals Rule 27(c)(2) provides: "Unsupported Claim of Error Treated as Abandoned. Any enumeration of error which is not supported in the brief by citation of authority or argument

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[10] In the Court of Appeals, Petitioners requested, received permission to, and then filed a brief double the 30 page limit. Resp. App. 32a-34a. The only language addressing constitutional issues was: "The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. Resp. App. 14a. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 599 (1996), the injury here 'was purely economic in nature,' and Defendants' conduct 'evinced no indifference to or reckless disregard for the health and safety of others.' *Id.* at 576."

shall be deemed abandoned." Resp. App. 3a. Rule 27(c)(3) provides: "Each enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of such reference, the Court will not . . . consider such enumeration." Resp. App. 3a. Numerous Georgia cases have applied Rule 27 and found arguments abandoned because they were not adequately supported in the brief. *See, e.g., Dixon v. MARTA*, 242 Ga. App. 262, 266 (2000) (cited by the Court of Appeals (Pet. App. 12a), "appellate judges should not be expected to take pilgrimages into records in search of error without the compass of citation and argument"); *Harrell v. Bedgood*, 121 Ga. App. 16, 17 (1970) (four sentences in brief insufficient argument to support an enumeration of error); *Mercer v. Woodard*, 166 Ga. App. 119, 129 (1983) (a single sentence of argument is "deficient"); *Taylor v. State*, 177 Ga. App. 624, 628 (1986) (bare citation to a single authority, without meaningful explanation of its relevance or applicability, is not enough to preserve any arguments arising out of that authority); *Haskins v. Jones*, 142 Ga. App. 153, 153 (1977) (holding enumerations of error abandoned for insufficient argument); *Evans v. State*, 159 Ga. App. 706 (1981) (mere statement of defendant's contention not sufficient argument to support enumeration of error); *O'Kelley v. Hayes*, 132 Ga. App. 134 (1974) (same); *McKeever v. State*, 118 Ga. App. 386, 391 (1968) (single sentence insufficient argument to support enumeration, which is deemed abandoned); *Jenkins v. State*, 240 Ga. App. 102, 103 (1999) ("This court requires that appellants support enumerations of error with argument and citations to authority. Mere conclusory statements such as those made here are not the type of meaningful argument contemplated by that rule."); *Williams v. State*, 219 Ga. App. 167, 168 (1995); *Moore v. Winn-Dixie Stores, Inc.*, 214 Ga. App. 157, 158 (1994) ("Any issue reasonably contained within an enumeration of error as to which there has not been any argument or citation of authority made in appellant's brief

is deemed abandoned on appeal.") (citations omitted), *overruled on other grounds, Robinson v. Kroger Co.*, 268 Ga. 735 (1997); *Management by Design, Inc. v. Lakeview Utils., Inc.*, 233 Ga. App. 711 (1998); *Ligon v. Bartis*, 254 Ga. App. 154, *cert. denied*, 123 S. Ct. 702 (2002).

The Georgia Court of Appeals broke no new ground here.

Petitioners argue that the holding of *Kent v. A.O. White, Jr., Consulting Engineers, P.C.* indicates that the waiver rules are not consistently applied. Pet. 16. But the *Kent* case was a short-lived aberration that never reflected or became the law in Georgia. As noted above, numerous pre-*Kent* cases held that a waiver resulted from failure to properly present an argument in a brief. *See supra* at 15-16. *Kent* held (without argument on the issue and without recognizing any of the prior cases), that the defendant would receive a *de novo* review of the *BMW* guideposts despite waiving such review by requesting abuse of discretion review. 253 Ga. App. 492, 498 (2002). When this case appeared before the Court of Appeals the second time, the waiver issue was actually briefed and argued, the prior cases were put before the court, and the nature of a GVR examined. The Court overruled *Kent* and reiterated the long-standing rules of waiver and abandonment in Georgia, from which *Kent* was an unsupported departure. Moreover, Petitioners could not have relied upon *Kent* in "refraining" from raising a federal due process challenge: Petitioners filed the brief in which they abandoned any such arguments on September 20, 1999; *Kent* was not decided until January 29, 2002.

B. Federal Courts Find Waiver Under Similar Facts

Petitioners' claim that their waiver was "imaginary" is also belied by the fact that federal courts find waiver under similar circumstances and rules. In *Coleman v.*

Thompson, 501 U.S. 722, 745-46 (1991), this Court held that where the state procedural rule upon which the waiver of federal claims was predicated had a federal counterpart, "a proper respect for the States required that federal courts give to the state procedural rule the same effect they give to the federal rule." *See also Francis v. Henderson*, 425 U.S. 536, 541-42 (1976) ("There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.").

Georgia Court of Appeals Rule 27(c) has a federal counterpart: FRAP 28(a)(9). Resp. App. 3a-4a. Applying that rule, Federal courts regularly refuse to consider issues supported only by cursory argument in a lengthy brief raising numerous issues. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as Dunkel's did. *Judges are not like pigs, hunting for truffles buried in briefs.*") (emphasis added) (citations omitted); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (in rejecting under Rule 28(a)(9) a claimed constitutional violation, the Ninth Circuit held that "[w]e review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and *a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.*") (emphasis added) (citations omitted); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work. . . . Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its

peace"). *See also United States v. Belgarde*, 300 F.3d 1177, 1181 n.1 (9th Cir. 2002) ("[F.R.A.P.] 28(a)(9)(A) requires an appellant to state in his or her argument, 'contentions and the reason for them, with citations to the authorities and parts of the record on which the appellant relies.' Belgarde did not do this . . . and as such abandoned any such issue on appeal.").

C. Petitioners Misstate The Holdings Of The Court Of Appeals And The Arguments Of The Parties

Petitioners apparently recognize that the authorities cited above deprive this Court of jurisdiction and doom their challenge to the Court of Appeals abandonment holding. Straining to escape that ruling, Petitioners contend that the unanimous Court of Appeals and the Georgia Supreme Court concocted an "entirely imaginary" waiver as a "pretext" to express "defiance" and "antagonism" towards this Court and its GVR order, "denounced" this Court, and refused to act in "good faith." Pet. 2, 3, 13, 17, 21. Petitioners misstate the holding of the Court of Appeals, clear Georgia law, and the arguments of the parties.

Petitioners assert that the Court of Appeals "defied this Court's directives" and "*refused* to conduct the *de novo* review required by federal law and dictated by this Court's GVR." Pet. at 13 (emphasis added). But, after finding that the federal due process challenge had not been preserved under Georgia's appellate rules, the Court of Appeals went on to review the punitive damages award *de novo* and apply the *Gore* guideposts. Pet. App. 12a. The multi-page, detailed *de novo* review that followed culminated in this finding: "[a]pplying a *de novo* standard of review and weighing the *Gore* guideposts, we find that the award of punitive damages under these circumstances does not violate appellants' federal due process rights." Pet. App.

16a. The Court of Appeals expressly performed the very analysis that Petitioners claim it "defiantly" refused to undertake.

To fuel this image of the "defiant" Georgia courts, Petitioners claim that the Court of Appeals "denounced this Court's punitive damages jurisprudence" and criticized it as a "'dangerous development'" and as "an imperfect . . . attempt to evaluate punitive damages." Pet. 2, 13. That language, however, came not from the Court of Appeals itself, but instead from law review articles it cited (Pet. App. 8a, 10a-11a n.6) as part of its balanced, scholarly analysis (Pet. App. 6a-10a) of whether the Georgia Supreme Court would use *Cooper's de novo* standard of review in evaluating claims of excessiveness of punitive damages under Georgia common law. For the federal Constitutional analysis, however, the Court of Appeals faithfully followed *BMW* and *Cooper*. Pet. App. 12a-16a.

To support their contention that the waiver was "entirely imaginary" (Pet. 13), Petitioners erroneously claim that, in the previous appearance of this case in this Court, Respondents asserted only a waiver argument "different than that embraced by the court of appeals." Pet. 15 n.9. That is also incorrect. At that stage, Respondents argued that no federal constitutional issue was preserved (*see, e.g.*, Resp. App. 21a-22a) (petitioners' arguments below were "inadequate to constitute the proper presentation of any federal constitutional concerns they might have had. . . . "). Respondents also argued that "[i]n their briefs in that court . . . Petitioners made only vague challenges to the punitive damages award . . . [and] included only two sentences alleging any due process violations. . . . In reference to the alleged excessiveness of the punitive damages, Petitioners included only a naked citation to *BMW* but offered no discussion of its potential relevance." Resp. App. 21a-22a. Those are *exactly* the fatal failures upon which the Court of Appeals based the waiver holding

that now controls this Court's disposition of this case. Pet. App. 11a-12a.

Using ellipses to alter the meaning of a quote, Petitioners assert that Respondents *conceded* "the proper presentation of some due process claims under *BMW*." Pet. 15, *quoting* 2001 Resp. at 18. There was no such concession. After arguing that *no BMW* claims were preserved (2001 Resp. at 7, 9, 27, Resp. App. 21a-22a), Respondents focused in on the alternative argument: "Nor could the proper presentation of *some* due process claims under *BMW* adequately preserve separate ones." 2001 Resp. at 18 (emphasis in original). Resp. App. 22a.

Petitioners incorrectly assert that "even in opposing petitioners' certiorari petition in the Georgia Supreme Court, respondents could not bring themselves to defend the court of appeals' waiver holding." Pet. 15. To the contrary, Respondents argued to the Georgia Supreme Court that "[t]he Court of Appeals' findings on these issues are unassailable." Resp. App. 24a. Respondents emphasized that the abandonment holding "relies on settled principles of Georgia law," and was "neither novel nor certworthy." Resp. App. 25a-26a. And Respondents argued that "the whole court's ruling also reaffirmed the longstanding rule under Georgia law that an argument not made in an appellant's brief is abandoned and is not preserved for review." Resp. App. 28a.

Absurdly, Petitioners argue that the Court of Appeals did not find a waiver of the *BMW* claim in the case's first appearance before that Court. Pet. 14-15. But the Court of Appeals did not then rule on or find a waiver of the *BMW* challenge *because* Petitioners had not yet raised the issue. Pet. App. 56a. "This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the

contrary.'" *Webb v. Webb*, 451 U.S. 493, 495 (1981) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

Petitioners argue that the waiver holding was suspect because the Court of Appeals did not hold the state common law excessiveness claim to be waived. Pet. 15-16. The answer: Petitioners *enumerated* common law excessiveness as error *and* devoted pages of their initial brief to common law excessiveness, in stark contrast to the two throw-away sentences arguably devoted to federal constitutional excessiveness. Resp. App. 14a.

Petitioners argue that this Court's GVR holding "*implied* a determination that petitioners' *BMW* claims . . . were properly preserved." Pet. at 16. That is not the law.[11] Proper preservation under rules of the Court of Appeals of Georgia is a matter of Georgia law. Even if this Court had *expressly* held that such claims were properly preserved under Georgia procedural rules (which it did not), the Georgia courts would remain free to disagree as to this matter of state law after remand. *See Georgia Ry. & Elec. Co. v. Decatur*, 297 U.S. 620 (1936); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 109 (1938); *Orr v. Orr*, 440 U.S. 268, 284 n.13 (1979).

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[11] *See Fontroy v. Owens*, 23 F.3d 63, 66 (3d Cir. 1994) (GVR in light of intervening Supreme Court case was not a decision on the contention that the petitioner had waived the issue governed by that case, and GVR could not be construed as "deciding the waiver issue."); *Varner v. Illinois State Univ.*, 226 F.3d 927, 936-37 (7th Cir. 2000) (although case was remanded for consideration of new Supreme Court authority, nothing in GVR order precluded court on remand from concluding defendant had waived that argument), *cert. denied*, 533 U.S. 902 (2001). This Court has held that, upon remand, appellate courts "remain free" to base their decisions on independent state law grounds. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990). *See Immuno, AG v. Moor-Jankowski*, 77 N.Y.2d 235, 251-52 (after GVR, court must *consider* intervening authority, but may base its decision upon independent state law grounds), *cert. denied*, 500 U.S. 954 (1991).

II. THE COURT OF APPEALS CONDUCTED A PROPER *DE NOVO* REVIEW UNDER *BMW*

Despite finding abandonment, the Court of Appeals alternatively performed a thorough *de novo* review under *BMW*, properly applying each guidepost.

The First Guidepost. Petitioners briefly assert (one paragraph) that their conduct was not "reprehensible" under the first *BMW* guidepost. Pet. 17-18. This contention is misplaced in an intentional tort case in which the jury found by special interrogatory that each Petitioner acted with "a specific intent to harm." Pet. App. 22a n.3. The Court of Appeals' painstaking review of the record and the multiple, intentional bad acts and schemes supporting its conclusion that the conduct of the Petitioners was "especially reprehensible" (Pet. App. 12a), are discussed in detail at pp. 3, 5-12, *supra*.

Petitioners' claim that the corporate "parents" had no notice that they could be liable for aiding and abetting their subsidiaries in a tortious scheme (Pet. 18-19) to divert hundreds of millions of dollars to the "parent" corporations is particularly specious.[12] The evidence showed that the directions to "take money belonging to" Respondents came from the "parent" corporations, the money went to the "parent" corporations, Pet. App. 24a, 25a, 28a, and the "parent" corporations *admitted* they "knew they had a duty to maximize the performance of the partnership parks". Pet. App. 40a, 24a. The Restatement

[12] In addition, Petitioners' notice claim is independently barred by their waiver at trial of any objection to aiding-and-abetting liability. As the Court of Appeals held, Petitioners waived this issue under state law in two ways: by failing to object at trial to the submission of this case to the jury on a theory of aiding-and-abetting liability (and in fact submitting their own charges on that theory), and by failing to "enumerate[ ] as error the jury's finding of liability on this theory." Pet. App. 34a-36a.

(Second) Torts § 874, comment c, provides for liability for aiding a breach of fiduciary duty. A Georgia statute gave notice that "in *all* cases" one who procures the commission of an actionable wrong "is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury." O.C.G.A. § 51-12-30 (emphasis added). Resp. App. 4a. Moreover, several published Georgia cases had *imposed* liability for aiding and abetting a breach of fiduciary duty prior to this case, but simply had not stated in so many words that Georgia recognizes this tort.[13] "It is bedrock law that the conduct of one who knowingly joins with a fiduciary . . . in breaching a fiduciary duty, is equally culpable." *Mills Acquisition Co. v. MacMillan, Inc.*, Del. Supr., 559 A.2d 1261, 1284 n.33 (1989). But even beyond that, the "parents" cannot reasonably have believed that they were immune from liability for directing their subsidiaries to breach fiduciary duties where the parents enjoyed the proceeds of the misconduct.

The Second Guidepost. Petitioners' second guidepost argument rests on the claim that the compensatory award was, itself, excessive and thus was punitive rather than "compensatory." Thus, Petitioners claim, the allowable

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[13] *Williams v. Service Corp. Int'l*, 218 Ga. App. 10, 459 S.E.2d 621 (1995) (denial of motion to dismiss claims for aiding and abetting torts including breach of fiduciary duty affirmed); *Gaines v. Crompton & Knowles Corp.*, 190 Ga. App. 863 (1989) (jury award of resulting profits of entity that aided breach of fiduciary duty authorized under Georgia law); *Arford v. Blalock*, 199 Ga. App. 434 (1991) (party who *induced* fiduciary to breach fiduciary duty liable for punitive damages). *See Loyola Fed. Sav. Bank v. Fickling*, 58 F.3d 603, 608 (11th Cir. 1995) (affirming verdict under Georgia law for assisting general partner's breach of fiduciary duty to limited partner); *Loyola Fed. Sav. & Loan Ass'n v. Fickling*, 783 F. Supp. 620, 625-26 & n.2 (M.D.Ga. 1992) (denying summary judgment on claim of assisting breach of fiduciary duty under Georgia law).

punitive damages ratio should be "lower." (Pet. 19-20). But the affirmed compensatory award, now paid by Petitioners and not subject to challenge in this Court, was, as found by the Court of Appeals, "well within the range of evidence" and calculated to a "reasonable certainty." Pet. App. 54a. Accordingly, the entitlement of Respondents to that amount *as* compensatory damages has been conclusively established, and the factual predicate to the argument therefore fails. Moreover, whatever the validity of Petitioners' argument in the abstract, it is moot here because the 1.3 to 1 ratio is already far "lower" than that allowed by many decisions of this and other Courts. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (punitive damages four times compensatory damages within constitutional boundaries).

The Third Guidepost. Petitioners' substantive arguments under the third guidepost also have no merit. In *BMW*, this Court set forth as its third guidepost "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. The Court of Appeals found Petitioner's conduct to be comparable to conduct that violates several Georgia statutes, including the Georgia RICO statute. Pet. App. 15a-16a. Each of the statutes punishing comparable conduct provides for either double or treble the compensatory damages as a penalty (and some also call for jail time). *Id.* Because the ratio here was 1.3 to 1, the Court of Appeals properly held that these statutory penalties, provided for comparable misconduct, satisfied the third guidepost. *Id.*

A. The Use Of Treble Damages Statutes For The Third Guidepost Analysis Is Proper

Petitioners' entirely new and unsupported argument that treble damages statutes cannot satisfy the third guidepost of *BMW* (Pet. 23) is contrary to existing authority. *See*,

e.g., *EEOC v. CEC Entertainment, Inc.*, No. 98-C-698-X, 2000 U.S. Dist. LEXIS 13934, at *52 (W.D. Wisc. 2000) (performing *BMW* analysis and upholding three to one ratio, noting that "'statutes routinely provide for double and treble damages awards to deter and punish.' For instance, the ADEA provides for double damages in cases of willful violations."); *EEOC v. AIC Sec. Investigations*, 55 F.3d 1276, 1287 (7th Cir. 1995) (punitive damages not excessive where "award is three times the amount of compensatory damages, and statutes routinely provide for double and treble damages awards to deter and punish."); *Pioneer Commer. Funding Corp. v. Am. Fin. Mortg. Corp.*, 50 Pa. D & C 4th 31, 69 (2000) (looking to analogous treble damages statute under third guidepost, and remitting punitive damages to 3:1).[14] *See also St. John v. Coisman*, 799 So. 2d 1110, 1122-23 (Fla. Dist. Ct. App. 2001).

Indeed, the very concept of a proportionality/ratio requirement had its "pedigree" in the long acceptance of treble damages awards. *BMW*, 517 U.S. at 580-81. As this Court noted in another punitive damages case, "[a]wards of double or treble damages authorized by statute date back to the 13th century." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 (1989). In keeping with this ancient tradition, many state and federal statutes set the penalty as "treble" the amount stolen or damages caused as punishment and to deter misconduct. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent

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[14] *See also Clark v. MetroHealth Found., Inc.*, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000) (punitive damages ratio of 3:1 or less reasonable "nearly as a matter of law" given prevalence of treble damages awards); *David v. Caterpillar, Inc.*, 185 F. Supp. 2d 918 (C.D. Ill. 2002) (where conduct was not particularly reprehensible, ratio would be reduced to 3:1 in light of discussion in *BMW* about long-time acceptance of treble damages).

to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.") This Court has never held that trebling of large compensatory awards implicated due process, and in fact recently denied certiorari in a treble damages case where the compensatory damages were $350 million and the total award exceeded $1 billion. *United States Tobacco Co. v. Conwood Co.*, Docket No. 02-603 (certiorari denied, January 13, 2003).[15] Based on this history, the use of treble damages statutes to satisfy the notice requirement of *BMW* is entirely appropriate, particularly where, as here, the appellate court looks to treble damages statutes governing "comparable" misconduct.[16] Indeed, if treble damages statutes did not

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[15] Notice of the potential ratio to the damages caused is sufficient notice to satisfy due process no matter how large the damages trebled. *See, e.g., United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (treble damages provision does not provide for penalty "disproportioned to the offense" and thus does not violate due process); *Dowell v. Department of Veterans' Affairs*, No. 3:95-CV-606-S, 1997 U.S. Dist. LEXIS 22777, at *8 (W.D.Ky. May 6, 1997) ("due process rights are not offended by the existence of a treble damages provision."); *Blane v. American Inventors Corp.*, 934 F. Supp. 903, 910 (M.D.Tenn. 1996) ("the Act's treble damages provision does not violate Defendants' due process rights."); *Jeppsen v. Piper, Jaffray & Hopwood*, 879 F. Supp. 1130, 1138 (D.Utah 1995) (award of treble damages with no review for excessiveness does not violate due process); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on November 15, 1987*, 720 F. Supp. 1505, 1518 (D.Col. 1989) (because it is proportional to actual damages, trebling does not present the due process concerns of punitive damages awards), *rev'd in part on other grounds*, 964 F.2d 1059 (10th Cir. 1992); *United States v. Hugelmeyer*, 774 F. Supp. 559, 562 (D.Ariz. 1991) (treble damages do not violate due process even where amount to be trebled is a "relatively large sum of money" – contrary argument is "illogical").

[16] Petitioners' argument that the statutes are not "comparable" would turn this Court into an arbiter of what is "comparable" under state law. *See BMW*, 517 U.S. at 577 ("only state courts may authoritatively construe state statutes."). The Court of Appeals correctly and specifically found that Petitioners "took money belonging to [appellees]."

(Continued on following page)

provide constitutionally sufficient notice of liability up to three times the actual damages, then all treble damages statutes would be unconstitutional.

Petitioners then argue that insufficient notice is provided by treble damages statutes "when applicable law does not limit compensatory damages to foreseeable injury." Pet. 23. That argument was never raised, even in Petitioners' briefing and argument on remand, and has not been preserved. That argument is also inconsistent with the holding of the Court of Appeals that the "evidence was sufficient to allow the jury to calculate damages to Fund caused by appellants with reasonable certainty." Pet. App. 54a. Moreover, the damages *were clearly "foreseeable"* – in fact, they were exactly what Petitioners intended when they acted with "specific intent to harm" (Pet. 22a) and implemented their "premeditated plan surreptitiously executed over a period of years" to "depress the value of their [partners'] investment" for Petitioners' own financial benefit, conduct the Court of Appeals found "especially reprehensible". Pet. App. 12a, 13a.

Pet. 55a. This is plainly comparable to theft. In Georgia, "[t]heft by taking in breach of a fiduciary obligation is a felony offense." *Hanson v. State*, 232 Ga. App. 352, 354 (1998); *see* O.C.G.A. §§ 16-8-2, -3. Resp. App. 4a-5a. As such, it is a serious crime, punishable by a 15-year prison term. *See* O.C.G.A. § 16-8-12(a)(2). Resp. App. 6a. Petitioners committed more than two acts of theft against both Flags and Fund, meaning that their conduct could fall under Georgia's RICO statute. *See* O.C.G.A. §§ 16-14-1 *et seq*. Resp. App. 9a. Accordingly, their conduct could trigger a prison term of up to 20 years and/or a fine as large as *three times* their pecuniary gain. *See* O.C.G.A. § 16-14-5. Resp. App. 9a The civil penalty for a RICO violation includes treble damages. *See* O.C.G.A. § 16-14-6(c). Resp. App. 11a. The Court of Appeals correctly analogized to these statutes.

B. The Court Of Appeals Was Not Required To Compare This Case To Other Punitive Verdicts Where Statutes Satisfied The Third Guidepost

Petitioners next argue that the Court of Appeals erred in not comparing this award to supposedly analogous punitive damages cases under the third guidepost. Pet. 24.[17] Petitioners do not explain why the third guidepost, which calls for a comparison to "civil or criminal penalties that could be imposed for comparable misconduct", cannot be satisfied by comparison statutory penalties, rather than past jury awards. Statutes (and no cases) were all this Court examined in the third guidepost portions of *BMW*, 517 U.S. at 583-86, and *Cooper*, 532 U.S. at 442. Lower courts were directed to give "substantial deference" to "*legislative pronouncements*" in a third guidepost analysis. *BMW*, 517 U.S. at 583. But in any event, such a review would not have assisted Petitioners, since a comparison to Georgia cases would still compel affirmance.[18]

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[17] Petitioners' claim that the Court of Appeals held it need not examine other cases on the third guidepost (Pet. 24) misconstrues the holding. The Court was specifically following *BMW*, Pet. App. 14a n.9 (*citing BMW [Gore]*, 517 U.S. at 580-83), and discussing the second, and not the third guidepost.

[18] The Georgia Courts have repeatedly affirmed punitive damages awards in breach of fiduciary duty cases with a much higher ratio to the compensatory award than the 1.3 to 1 ratio here. *See Byrne v. Reardon*, 196 Ga. App. 735 (1990) (ratio of 100:1 affirmed in breach of fiduciary duty case); *Arford v. Blalock*, 199 Ga. App. 434 (1991) (party who *induced* fiduciary to breach duty liable for punitive damages: 5:1 ratio approved and verdict reinstated); *Elliott v. McDaniel*, 224 Ga. App. 848 (1996), *rev'd on other grounds*, 269 Ga. 262 (1998) (punitive damages with 10:1 ratio affirmed in breach of fiduciary duty and misappropriation of corporate opportunity case); *E.F. Hutton & Co. v. Weeks*, 166 Ga. App. 443 (1983) (punitive damages with 2.2:1 ratio affirmed in breach of fiduciary duty case).

As this Court held in *Haslip,* 499 U.S. at 23-24, a 4:1 compensatory-to-punitive ratio does not "cross the line into the area of constitutional impropriety." Based upon *Haslip*, Petitioners certainly were on notice that punitive damages of up to four times the harm they intentionally inflicted on their partners could be the result of their intentional torts.

III. THE REQUEST FOR GVR IN LIGHT OF *STATE FARM* IS MERITLESS

Petitioners request a GVR in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, Docket No. 01-1289 ("*Campbell*") in which argument was heard on December 9, 2002. Even if Petitioner had not abandoned all federal constitutional challenges to the award, there would still be no basis for another GVR in this case.

In *Campbell*, the Utah Supreme Court affirmed a verdict for $145 million in punitive damages, based on a compensatory damages award of $911.25 in pecuniary damages and $1,000,000 in general (emotional) damages – a ratio of 145:1 between punitive damages and total compensatory damages.

This ratio makes *Campbell* irrelevant to this case and its 1.3 to 1 ratio. Even if this Court were to adopt the 5:1 "cap" on the ratio of punitive to compensatory damages suggested by the petitioner in *Campbell* at oral argument, it would not impact this case.

Further, as Petitioners concede, the present case does not contain the "extraterritoriality" issue which is the focal point of *Campbell*. Pet. 25. In fact, here the jury was *expressly* instructed *not* to award punitive damages for extraterritorial acts: "punitive damages . . . are awarded . . . solely . . . for conduct which causes harm or threatens to cause harm to the rights of persons *within the State of*

Georgia." Resp. App. 33a (emphasis added). There is no basis to GVR this case again.

CONCLUSION

Allegations that the appellate courts of a state have deliberately refused to carry out the mandate of this Court are serious matters. *See Cooper v. Aaron*, 358 U.S. 1 (1958). Incorrect allegations of such misbehavior should never be advanced. The courts of Georgia have faithfully applied relevant federal law to this case and the resulting judgment raises no issue worthy of this Court's review. The Petition should be denied.

Respectfully submitted,

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February 12, 2003

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RESPONDENTS' APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE
Title 28 – Judiciary and Judicial Procedure
Part IV – Jurisdiction and Venue
Chapter 81 – Supreme Court

* * *

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

RULES OF THE COURT OF APPEALS OF THE STATE OF GEORGIA

Rule 27. Structure and Content.

(a) **Appellant**. – The brief of appellant shall consist of three parts:

1. Part One shall contain a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal and the citation of such parts

of the record or transcript essential to a consideration of the errors complained of, and a statement of the method by which each enumeration of error was preserved for consideration. Record and transcript citations must be to the volume or part of the record or transcript and the page numbers that appear on the appellate records or transcript as sent from the court below.

2. Part Two shall consist of the enumeration of errors.

3. Part Three shall contain the argument and citation of authorities. It shall also include a concise statement of the applicable standard of review with supporting authority for each issue presented in the brief.

(b) **Appellee.** – The brief of appellee shall be divided in the following manner:

1. Part One shall point out any material inaccuracy or incompleteness of appellant's statement of facts and any additional statement of facts deemed necessary, plus such additional parts of the record or transcript deemed material. Failure to do so shall constitute consent to a decision based on the appellant's statement of facts. Except as controverted, appellant's statement of facts may be accepted by this Court as true.

2. Part Two shall contain appellee's argument and the citation of authorities as to each enumeration of error. It shall also include the standard of review if different from that contended by the appellant.

(c) **General Provisions.** – 1. Sequence of Argument. The sequence of arguments in the briefs shall follow the

order of the enumeration of errors, and shall be numbered accordingly.

2. Unsupported Claim of Error Treated as Abandoned. Any enumeration of error which is not supported in the brief by citation of authority or argument may be deemed abandoned.

3. References to Record or Transcript. i. Each enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of such reference, the Court will not search for or consider such enumeration.

ii. A contention that certain matters are not supported by the record may be answered by reference to particular pages where they appear.

iii. Reference to the record should be indicated by specific volume or part of the record and by (R-Page Number of the Record). Reference to the transcript should be indicated by specific volume or part of the transcript and by (T-Page Number of the Transcript). Reference to a motion transcript should be indicated by (MT-Page Number of the Transcript and date of the hearing).

iv. No briefs or motions shall be filed under seal unless counsel has moved the Court for permission to file under seal and the Court has granted such motion.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 28. Briefs

(a) **Appellant's Brief**. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * *

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issue);

OFFICIAL CODE OF GEORGIA

* * *

§ 51-12-30. Procurer of wrong is joint wrongdoer.

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.

* * *

§ 16-8-2. Theft by taking.

A person commits the offence of theft by taking when he unlawfully takes or, being in lawful possession thereof,

unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

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§ 16-8-3. Theft by deception.

(a) A Person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

(1) Creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

(2) Fails to correct a false impression of an existing fact or past event which he has previously created or confirmed;

(3) Prevents another from acquiring information pertinent to the disposition of the property involved;

(4) Sells or otherwise transfers or encumbers property intentionally failing to disclose a substantial and valid known lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not a matter of official record; or

(5) Promises performance of services which he does not intend to perform or knows will not be performed. Evidence of failure to perform standing alone shall not be sufficient to authorize a conviction under this subsection.

(c) "Deceitful means" and "artful practice" do not, however, include falsity as to matters having no pecuniary significance, or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

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§ 16-8-12. Punishment.

(a) A person convicted of a violation of Code Sections 16-8-2 to 16-8-9 shall be punished as for a misdemeanor except:

(1) If the property which was the subject of the theft exceeded $500.00 in value, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor;

(2) If the property was taken by a fiduciary in breach of a fiduciary obligation or by an officer or employee of a government or a financial institution in breach of his or her duties as such officer or employee, by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(3) If the crime committed was a violation of Code Section 16-8-2 and if the property which was the subject of the theft was a memorial to the dead or any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead, by imprisonment for not less than one nor more than three years. Nothing in this paragraph shall be construed as to cause action taken by a cemetery, cemetery owner, lessee, trustee, church, religious or fraternal organization,

corporation, civic organization, or club legitimately attempting to clean, maintain, care for, upgrade, or beautify a grave, gravesite, tomb, monument, gravestone, or other structure or thing placed or designed for a memorial of the dead to be a criminal act;

(4) (A) The provisions of paragraph (1) of this subsection notwithstanding, if the property which was the subject of the theft was a motor vehicle or was a motor vehicle part or component which exceeded $100.00 in value or if the theft or unlawful activity was committed in violation of subsection (b) of Code Section 10-1-393.5 or in violation of subsection (b) of Code Section 10-1-393.6 or while engaged in telemarketing conduct in violation of Chapter 5B of Title 10, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor; provided, however, that any person who is convicted of a second or subsequent offense under this paragraph shall be punished by imprisonment for not less than one year nor more than 20 years.

(B) Subsequent offenses committed under this paragraph, including those which may have been committed after prior felony convictions unrelated to this paragraph, shall be punished as provided in Code Section 17-10-7;

(5) (A) As used in this paragraph, the term:

(i) "Destructive device" means a destructive device as such term is defined by Code Section 16-7-80.

(ii) "Explosive" means an explosive as such term is defined by Code Section 16-7-80.

(iii) "Firearm" means any rifle, shotgun, pistol, or similar device which propels a projectile or projectiles through the energy of an explosive.

(B) If the property which was the subject of the theft offense was a destructive device, explosive, or firearm, by imprisonment for not less than one nor more than ten years; or

(6) If the property which was the subject of the theft is a grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, and if such grave marker, monument, memorial, plaque, or marker is privately owned or located on privately owned land, by imprisonment for not less than one nor more than three years if the value of the property which was the subject of the theft is $300.00 or less, and by imprisonment for not less than three years and not more than five years if the value of the property which was the subject of the theft is more than $300.00.

(b) Except as otherwise provided in paragraph (4) of subsection (a) of this Code section, any person who commits the offense of theft by deception when the property which was the subject of the theft exceeded $500.00 in value and the offense was committed against a person who is 65 years of age or older shall, upon conviction thereof, be

punished by imprisonment for not less than five nor more than ten years.

(c) Where a violation of Code Section 16-8-2 to 16-8-9 involves the theft of a growing or otherwise unharvested commercial agricultural product which is being grown or produced as a crop, such offense shall be punished by a fine of not less than $500.00 and not more than the maximum fine otherwise authorized by law. This minimum fine shall not in any such case be subject to suspension, stay, or probation. This minimum fine shall not be required in any case in which a sentence of confinement is imposed and such sentence of confinement is not suspended, stayed, or probated; but this subsection shall not prohibit imposition of any otherwise authorized fine in such a case.

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§ 16-4-1. Short title.

This chapter shall be known and may be cited as the "Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act."

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§ 16-14-5. Criminal penalties and alternative fine.

(a) Any person convicted of the offense of engaging in activity in violation of Code Section 16-14-4 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the fine specified in subsection (b) of this Code section, or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of the offense of engaging in conduct in violation of Code Section 16-14-4 may be sentenced to pay a fine that does not exceed the greater of $25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

(c) The court shall hold a hearing to determine the amount of the fine authorized by subsection (b) of this Code section.

(d) For the purposes of subsection (b) of this Code section, "pecuniary value" means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else, the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of $100.00.

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§ 16-14-6. Other civil remedies.

(a) Any superior court may, after making due provisions for the rights of innocent persons, enjoin violations of Code Section 16-14-4 by issuing appropriate orders and judgments including, but not limited to:

(1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant including,

but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of Code Section 16-14-4;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; or

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of this state or the revocation of a certificate authorizing a foreign corporation to conduct business within this state upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of Code Section 16-14-4 and that, for the prevention of future criminal activity, the public interest requires that the charter of the corporation be forfeited and that the corporation be dissolved or the certificate be revoked.

(b) Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred. The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

(d) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state or the county (other than for costs) has in the same property or proceeds. To enforce such a claim, the injured person must intervene in the forfeiture proceeding prior to is final disposition.

(e) A conviction in any criminal proceeding under this chapter shall estop the defendant in any subsequent civil action or proceeding as to all matters proved in the criminal proceeding.

APPENDIX B

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

[September 20, 1999]

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* * *

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This award violates the Excessive Fines Clause of the Georgia Constitution because, as in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988),

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there is no "sensible relation between punishment and offense". *Id.* at 119-20, 365 S.E.2d at 831. Notably, Defendants' conduct involved no "personal injury or death" (or even a *risk* of injury or death). *Id.* at 122, 365 S.E.2d at 833. The punitive damages also violate the Due Process Clauses of the Georgia and United States Constitutions. As in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the injury here "was purely economic in nature", and Defendants' conduct "evinced no indifference to or reckless disregard for the health and safety of others". *Id.* at 576.

APPENDIX C

IN THE COURT OF APPEAL [*sic*]

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

REPLY BRIEF OF APPELLANTS

[October 22, 1999]

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* * *

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C. The Punitive Damages Are Excessive.

Plaintiffs incorrectly assert that the ratio of compensatory to punitive damages "insulates" the punitive damages award. The actual ratio is much higher than Plaintiffs claim because the compensatory damages award is itself grossly excessive. (Dft. Br. at 51-57) In any event, this ratio is *not* the legal standard for the validity of punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996); *Hospital Auth. of Gwinnett County v. Jones*, 261 Ga. 613, 614, 409 S.E.2d 501, 502-03 (1991).

APPENDIX D

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS INC., and
SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

APPELLANTS' MOTION FOR RECONSIDERATION

[July 21, 2000]

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* * *

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XI. THE COURT SHOULD RECONSIDER ITS DECISION WITH RESPECT TO ENUMERATION OF ERROR NUMBERS TWELVE, THIRTEEN AND FOURTEEN

The Court appears not to have considered controlling legal precedent cited by Defendants on pages 57-60 of their opening brief and 28-30 of their reply brief that mandate that the punitive damage award be stricken, or at least vastly reduced. In particular, we note the rule that, absent "circumstances of aggravation or outrage", *Tri-County Inv. Group, Ltd. v. Southern States, Inc.*, 231 Ga. App. 632, 638, 500 S.E.2d 22, 27-28 (1998), or fraud, *see Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 620, 507 S.E.2d 168, 170 (1998) (refusal to award punitive damages appropriate where there was no "significant amount of fraud"), punitive damages are not authorized. Further, the Court has overlooked the dictates of O.C.G.A. § 51-12-5.1, which requires that "specific intent to cause harm" had to be proved by clear and convincing evidence. O.C.G.A. § 51-12-5.1(b). The trial court's failure to instruct the jury on the standard of proof for the specific-intent finding was *per se* reversible error. *See Hammett v. Reynolds*, 243 Ga. 669, 671-72, 256 S.E.2d 354, 356-57 (1979). Finally, the Court has not, as is required by

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O.C.G.A. § 51-12-12(a), set aside the award as violating the Excessive Fines Clause of the Georgia Constitution because there is no "sensible relation between punishment and offense", *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 119-22, 365 S.E.2d 827, 831-33 (1988), and the Due Process Clauses of the Georgia and United States Constitutions, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

APPENDIX E

No. 00-1875

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,

Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

---

BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

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After their post-trial motion was denied, Petitioners appealed to the Georgia Court of Appeals. In their briefs in that court, no excerpts of which are included in the appendix to the petition despite Petitioners' obligations under Rule 14.1(g)(i) of this Court, *see infra* p. 11 n.13, Petitioners made only vague challenges to the punitive damages award. Under the heading "The Punitive Damages Are Excessive," Petitioners' "Brief of Appellants" included only two sentences alleging any due process violations. They cited *BMW* only as limiting the amount

[Page 8]

of punitive damages in cases involving "purely economic" harm; they made no reference at all to the "third guidepost" argument that forms the basis for Question 1 of their petition in this Court (reordered Question 2). Resp. App. 12a-13a. As for Question 2 of their petition in this Court (reordered Question 3), at no time did Petitioners assert or even insinuate to the Court of Appeals that the punitive damages award was constitutionally infirm because they lacked notice they could be liable for aiding and abetting breaches of fiduciary duty. Finally, with respect to their Question 3 (reordered Question 1), under the heading "Standard of Review," Petitioners *elected* not to urge that *de novo* review was constitutionally required; instead Petitioners requested the exact "abuse of discretion" standard they now challenge. Petitioners stated that "[t]his Court reviews for *abuse of discretion* rulings . . . for excessive damages." *Id.* at 12a (emphasis added).

. . .

[Page 9]

In reference to the alleged excessiveness of the punitive damages, Petitioners included only a naked citation to *BMW* but offered no discussion of its potential relevance. Resp. App. 17a-18a.

. . .

[Page 18]

Nor could the proper presentation of *some* due process claims under *BMW* adequately preserve separate ones; . . .

* * *

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. . . Petitioners made only the briefest mention of due process in their briefs in the Court of Appeals, and their argument and their citation to *BMW* were limited exclusively to the point that this case involves economic damages rather than threats to health and safety. Resp. App. 13a, 15a. This was clearly inadequate to constitute the proper presentation of any federal constitutional concerns they might have had about notice.

APPENDIX F

IN THE SUPREME COURT OF GEORGIA

CASE NO. S02C1177

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
SIX FLAGS ENTERTAINMENT CORPORATION,
SIX FLAGS THEME PARKS, INC., and
SIX FLAGS OVER GEORGIA, INC.,

Defendants-Petitioners

vs.

SIX FLAGS OVER GEORGIA, LLC,
SIX FLAGS FUND, LTD. (L.P.),
and GEORGE DEROY, as Trustee
of the Six Flags Claims Trust,

Plaintiffs-Respondents

CASE NO. A00A0120 IN THE
GEORGIA COURT OF APPEALS

RESPONSE OF PLAINTIFFS TO DEFENDANTS – *SECOND* PETITION FOR WRIT OF CERTIORARI

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* * *

[Page 6]

Section I of the petition complains that every judge on the whole Court of Appeals erred by finding that Time Warner had abandoned its de novo constitutional challenge to the award of punitive damages by failing to enumerate that alleged error on appeal or to cite authority and argue in support of that proposition. The Court of Appeals' findings on these issues are unassailable. Further, Time Warner expressly requested an abuse of discretion review for the alleged excessiveness of the punitive damages award – not a de novo constitutional challenge. Court of Appeals Brief of Appellants at 17 (filed Sept. 20, 1999). This is not simply "the omission of an adverb" or "a supposed flaw in the body of [Time Warner's] brief" as Time Warner disingenuously claims. Petition at 9.

* * *

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ARGUMENT AND CITATION OF AUTHORITY

I. THE COURT OF APPEALS' CORRECT FINDING THAT TIME WARNER ABANDONED ITS DE NOVO CONSTITUTIONAL CHALLENGE PROVIDES NO BASIS FOR A GRANT OF CERTIORARI, ESPECIALLY WHEN THE COURT OF APPEALS WENT ON TO CONSIDER AND DECIDE THAT VERY EXCESSIVENESS CHALLENGE ON THE MERITS DESPITE THE ABANDONMENT.

The Court of Appeals' finding that Time Warner abandoned the very "de novo" constitutional challenge to the punitive damages award for which the case was remanded relies on settled principles of Georgia law. In reaching this unanimous finding, the whole court noted that Time Warner's enumerations of error failed to contain any allegation that the punitive damages violated any provision of the state or federal constitution, were "constitutionally excessive," or implicated any species of due process or other constitutional issue. *Six Flags II*, slip. op. at 13. But the Court did not base its finding solely on the enumerations failure. The Court noted that, even if the alleged error were "adequately enumerated," "the claim of error [was] abandoned because [defendants] failed to cite any relevant facts, give record citations, or present any legal analysis supporting that assertion." Slip op. at 14 (citing Court of Appeals Rule 27(c)(2), (3)).[6]

---

[6] Confronted with the Court of Appeals' finding that Time Warner's enumerations and brief

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These findings are neither novel nor certworthy. They are based in the settled principle that litigation, even appellate litigation, must come to an end one day. Allowing a litigant to raise issues on appeal that were improperly enumerated and abandoned would be unfair and would also tend to make the appeals process interminable.[7]

There is an even *broader* reason Time Warner should be barred from asserting its claim for a de novo constitutional challenge: Time Warner *asked* the Georgia Court of Appeals to apply an "abuse of discretion" review to the alleged excessiveness of the punitive damages award. Specifically, Georgia Court of Appeals Rule 27(a) requires appellants to set forth, for each issue raised, the "standard of review" the appellate contends the Court should apply. In its Court of Appeals Brief of Appellants in the initial appeal, Time Warner expressly specified that the appropriate standard of review for its "excessiveness" issues was "abuse of discretion." Court of Appeals Brief of Appellants at 17 (filed Sept. 20, 1999). "A party will not be heard to complain of a ruling *which it sought* or to which it acquiesced." *Firstline Corp. v. Valdosta-*

---

abandoned any claim to a de novo constitutional challenge. (*Six Flags II*, slip op. at 13-14), Time Warner fails to identify a single instance where it raised that issue in the Court of Appeals. Petition at 1, 11-15.

[7] In a bizarre twist, Time Warner seems to argue that plaintiffs "abandoned" the capacity to assert Time Warner's own "abandonment" of the de novo constitutional challenge in this appeal. Pretermitting whether a *party's* conduct could ever preclude a *court's* ability to enforce its own rules of appellate procedure, it is clear plaintiffs "abandoned" nothing – for the court or anyone else. Plaintiffs have repeatedly asserted the untimeliness of Time Warner's attempt to create a constitutional challenge following its initial appeal when none theretofore existed. *See, e.g.,* Plaintiffs' Response to Defendants' First Petition

for Certiorari (filed 8/28/00) at 2, ("it is too late for Time Warner to claim a 'constitutional' question"): *id.*, at 25-26 ("This Court may not grant certiorari to review constitutional arguments . . . not decided by the Court of Appeals."). Even *defendants* acknowledged plaintiffs' argument. *See Defendants'* Reply Brief in Support of First Petition for Certiorari (filed 9/20/00) at 9 ("Plaintiffs are simply wrong when they claim that defendants' challenge to the punitive damages award in this case as constitutionally excessive was waived.").

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Lowndes County Indus. Auth., 236 Ga. App. 432, 434, 511 S.E.2d 538 (1999) (emphasis added); *Spearman v. Georgia Bldg. Auth.*, 224 Ga. App. 801, 805, 482 S.E.2d 463, 466 (Ga. App. 1997) (one may not "complain of a judgment, order, or ruling that his own procedure or conduct aided in causing"); *Moody v. Dykes*, 269 Ga. 217, 221, 496 S.E.2d 907, 911 (1998) (same).

Finally, the Court of Appeals' finding that Time Warner abandoned this issue provides no basis for a grant of certiorari in this case because, despite Time Warner's procedural default, the Court of Appeals fully considered and correctly decided the abandoned challenge on the merits: "as a matter of judicial economy, we also review the punitive damages award de novo and apply the *Gore* guideposts." Slip op. at 15. That substantive inquiry is addressed in the next section.

But before returning to that final issue, plaintiffs must address some of Time Warner's more egregious misstatements relating to Time Warner's clear abandonment of the challenge it belatedly makes. First, Time Warner tries to leave the impression that the Court of Appeals' abandonment ruling broke some new ground. In fact, the opposite is true. The Court of Appeals did not announce or create any new principle that warrants

review by this Court. On the other hand, *Kent v. White*, a panel decision on which certiorari was never sought and which the whole court overruled in part in its decision below, did break new ground. *See Kent v. A.O. White, Jr., Consulting Engineer P.C.*, No. A01A0756 (Ga. Ct. App. Jan. 29, 2002). *Kent* had held that a Georgia Supreme Court remand to the Court of Appeals for reconsideration in light of new authority was to be viewed as a "sub silencio" holding by the Georgia Supreme Court that the application of the new authority had not been waived. *Kent*, slip op. at 12. Because *Kent's* inference of such a "sub-silencio" holding contradicted a long line of authority from this Court and the Court of Appeals, the Court of Appeals in the unanimous whole court decision below

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overruled *Kent v. White* and merely returned to the well-established status quo on those issues. *See Six Flags II*, slip op. at 5-7.[8] Further, the whole court's ruling also reaffirmed the longstanding rule under Georgia law that an argument not made in appellant's brief is abandoned and is not preserved for review.[9]

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[8] *See also South Ga. Med. Ctr. v. Washington*, 269 Ga. 366, 368 (1998) (issues not actually decided can be considered upon remand); *Shadix v. Carroll County*, 274 Ga. 560, 563, 554 S.E.2d 465, 468 (2001) ("it is only those issues actually considered and ruled upon by this Court that fall within 'law of the case' doctrine."); *Morgan v. Guaranty Nat'l Cos.*, 268 Ga. 343, 345 n. 1 (1997) (disapproving a Court of Appeals holding that the Supreme Court case established a rule of law "sub silentio"). *See also Middlebrooks v. Hillcrest Foods, Inc.*, 256 Ga.3d 1241, 1249 n. 5 (11th Cir. 2001) (in Georgia case, a trial court ruling on excessiveness of punitive damages would be reviewed for abuse of discretion where the challenge was not properly brought under federal due process clause so as to invoke *Cooper*); *Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d 1189, 1194 n. 3 (8th Cir. 2001) (*de novo* review under *Cooper* is not

required unless defendant properly raises a federal due process challenge to the punitive damages).

[9] *See Williams v. State*, 219 Ga. App. 167, 168, 464 S.E.2d 404, 405 (Ga. App. 1995) ("The claims asserted in appellant's brief in support of this enumeration are the sole claims preserved for appellate review as to this matter. 'Any issue reasonably contained within an enumeration of error as to which there has not been any argument or citation of authority made in appellant's brief is deemed abandoned on appeal.' ") (citation omitted) (emphasis supplied); *Moore v. Winn-Dixie Stores, Inc.*, 214 Ga. App. 157, 158, 447 S.E.2d 122, 123 (Ga. App. 1994) ("Any issue reasonably contained within an enumeration of error as to which there has not been any argument or citation of authority is deemed abandoned on appeal.") (citations omitted), *overruled on other grounds, Robinson v. Kroger*, 268 Ga. App. 735, 493 S.E.2d 403 (Ga. 1997) (*Jenkins v. State*, 240 Ga. App. 102, 103 (1999) ("This court requires that appellants support enumerations of error with argument and citations to authority. Mere conclusory statements such as those made here are not the type of meaningful argument contemplated by that rule.") *See Peripety Group, Inc. v. Smith*, 237 Ga. App. 158, 162, 514 S.E.2d 262, 266 (Ga. Ct. App. 1999) ((" '[O]ur review is limited to those matters enumerated **and argued** by an appellant[.]' ") (citation omitted); *Ligon v. Bartis*, 2002 Ga. App. LEXIS 212 (2002) (absence of meaningful argument in brief authorizes Court of Appeals to treat claim as abandoned).

APPENDIX G

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., and SIX FLAGS OVER GEORGIA, INC.,	§	
Appellants,	§	Case Number
vs.	§	A00A0120
SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD., (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,	§	
Appellees.	§	

MOTION FOR EXPANSION OF PAGE LIMITS

[Page 1]

COME NOW Appellants/Defendants Time Warner Entertainment Company, L.P., Six Flags Entertainment Corporation, Six Flags Theme Parks Inc. and Six Flags Over Georgia, Inc. and file this motion requesting, under Court of Appeals Rules 23(e) and 41, an expansion of the page limits for the parties' briefs.

This is an appeal from a jury verdict in the amount of $454,296,000. The case is a business dispute between the partners that owned and operated the Six Flags Over Georgia theme park (the "Park"). The limited partner, Plaintiff Six

[Page 6]

* * *

In the light of the number of significant legal and evidentiary errors involved in this case, and the unprecedented size of the jury verdict, Appellants respectfully suggest that a 60-page limit for the parties' briefs is appropriate. Appellants request that they be permitted to submit a single, joint Appellants' Brief, not exceeding sixty (60) pages; that Appellees be permitted to submit a single, joint Appellees' Brief not exceeding sixty (60) pages; and that Appellants be permitted to submit a single, joint Reply Brief not exceeding thirty (30) pages. Appellants believe that such an extension is in the interest of justice as it would permit all parties adequately to address the numerous issues raised by this appeal and would assist the Court in considering and resolving these issues.

Respectfully submitted, this 1st day of September, 1999.

CHANDLER & BRITT, LLC
Attorneys for Appellants

WALT M. BRITT
Georgia Bar Number 083237

COURT OF APPEALS
of the State of Georgia

ATLANTA, September 3, 1999

The Court of Appeals hereby passes the following order:

A00A0120. TIME WARNER ENTERTAINMENT COMPANY, L.P. ET AL v. SIX FLAGS OVER GEORGIA, LLC, ET AL

Upon consideration of the motion for permission to file briefs in excess of 30 pages on behalf of the appellant in the above styled case, it is ordered that said motion be GRANTED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, Sep -3, 1999

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

William L. Martin III

APPENDIX G

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD., (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE NO.: 97-A-1939-1
TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., and SIX FLAGS OVER GEORGIA, INC.,	)	
Defendants.	)	

Daily Transcript of proceedings before the Honorable James W. Oxendine, Gwinnett County Superior Court Judge, taken before Judy J. Smith, Certified Shorthand Reporter and Notary Public, on the 21st day of December, 1998.

* * *

I charge you that punitive damages, when authorized, are awarded not as compensation to a plaintiff but solely to punish, penalize or deter the defendant for conduct which causes harm or threatens to cause harm to the rights of persons within the state of Georgia.

[Pages 163-64]

* * *

(3)

Supreme Court, U.S.
FILED
FEB 25 2003
OFFICE OF THE CLERK

No. 02-978

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

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Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) . . . . . *passim*

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R. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 1

REPLY BRIEF FOR PETITIONERS

As we demonstrated in the Petition, the Georgia Court of Appeals defied this Court's prior GVR order by resting its judgment (affirming a $257 million punitive damages award) on a transparently meritless waiver ground and by refusing to conduct the "thorough, independent review" required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). Respondents' brief does not (and cannot) provide a meritorious defense of the court of appeals' decision. This Court should therefore reverse the judgment, summarily or otherwise.

1. The court of appeals used an arbitrary and unprecedented waiver holding in an attempt to insulate from review its unwarranted rejection of petitioners' federal constitutional claims. Respondents' belated defense of the court of appeals' waiver holding is insubstantial.

At the outset, respondents unsuccessfully seek to shore up that holding by suggesting (at 14, 21) that the court of appeals faulted petitioners for failing to include their federal due process claims in their "enumerations of error." The court of appeals' opinion makes clear that it did not rest on any enumerations-related ground: although the court of appeals noted that the relevant enumeration challenged the punitive award as "excessive" (not "grossly excessive"), it "[p]retermitt[ed] whether this adequately enumerated an 'excessiveness' claim under the federal due process clause." Pet. App. 11a. For good reason: the enumeration was more than adequate under state law, *see Felix v. State*, 523 S.E.2d 1 (Ga. 1999), and a State in any event could not hinge the preservation of a federal claim on the inclusion of the word "grossly" in "grossly excessive." *See generally* R. Stern, *et al.*, *Supreme Court Practice* 210-15 (8th ed. 2002).

Respondents are similarly mistaken in arguing (at 14) that petitioners' original court of appeals brief presented their *BMW* claims in only two sentences of argument and one citation of authority. Although that would have been enough,[1] there was much more. Despite a pressing page limit (particularly for a case in which the trial spanned five weeks), petitioners explained in detail why the punitive award violated *state* law. *See* Pet. 13-14; Pet. App. 68a-70a. They then added that, for the same reasons, the award "also violate[d] the Due Process Clauses of the Georgia and United States Constitutions." *Id.* at 70a. Georgia courts cannot thwart federal claims on the strength of a rule requiring senseless repetition: quite apart from the impermissible novelty of such a rule,[2] it does not "serv[e] a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

In response to petitioners' observation that respondents never before argued that petitioners failed to preserve *any* due process claims, respondents resort to desperate tactics. In a brief filed during this case's first visit here, respondents claimed that petitioners' arguments had been "inadequate to constitute the proper presentation of any federal constitutional concerns they might have had *about notice*." Br. in Opp. App. 22a (emphasis added). That statement referred to a specific subset of petitioners' due process claims: namely, their argument that petitioners lacked notice that punitive damages might be imposed

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[1] In none of the cases respondents cite (at 15) did the appellants provide as much legal analysis as petitioners here. Besides, the Georgia Supreme Court has held that, because Rule 27(c)(2) is framed in the disjunctive, either "argument" or "citation of authority" suffices. *See American Cent. Ins. Co. v. Lee*, 548 S.E.2d 338, 341 (Ga. 2001).

[2] *See, e.g., Preston v. Georgia Power Co.*, 489 S.E.2d 573, 575 n.1 (Ga. Ct. App. 1997) (allowing one party to "incorporat[e] by reference" arguments in *another party's* briefs).

where, at the time of their conduct, its illegality was not clearly established (set forth at pages 16-22 of petitioners' first Petition). Respondents (at 19) now attempt to turn that statement into a blanket waiver argument by ellipsing out the italicized words.[3] The attempt is unconvincing.[4]

Respondents are equally mistaken when they minimize the court of appeals' failure to invoke waiver when the case was first before it. According to respondents (at 20), the court of appeals did not find a waiver "*because* Petitioners had not yet raised the issue." But if that had been the court of appeals' reasoning, it would have said so at the time: it expressly found Rule 27 waiver in connection with another issue. *See* Pet. App. 52a n.6. The court's failure to do so with respect to petitioners' federal claims demonstrates that the procedural bar was invented *post hoc*.

Finally, respondents unsuccessfully attempt (at 21 & n.11) to explain away this Court's prior GVR order by arguing that *federal* courts have sometimes found waiver following a GVR from this Court. But, in the instant case,

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[3] Perhaps on the theory that the best defense is a vigorous offense, respondents (at 20) ironically accuse *petitioners* of "[u]sing ellipses to alter the meaning of a quote." The quotation in question — which, incidentally, did not even use ellipses — was entirely accurate. Petitioners quoted a brief in which respondents had argued not that petitioners had failed to preserve *any* due process claims, but only that "the proper presentation of *some* due process claims under *BMW*" could not "adequately preserve separate ones." Br. in Opp. 22a. The quoted brief thus conceded — or, at a minimum, never contested — that at least *some* claims under *BMW* were adequately preserved.

[4] Similarly meritless is respondents' suggestion that they defended the court of appeals' waiver ground in the Georgia Supreme Court. Respondents' brief in that court wrongly attributed to the court of appeals a narrower waiver theory — that petitioners had failed to preserve their request for the *de novo* review required by *Cooper* — and then defended the result on *that* ground. *See* Br. in Opp. 24a-29a.

the preservation issue was extensively briefed in this Court before the GVR issued, raising a strong inference that the Court rejected respondents' waiver arguments. Moreover, as respondents themselves have argued in this Court, *see* Pet. 16; Br. in Opp. 4, preservation is a jurisdictional matter in a case hailing from *state* court. By their own theory, then, the prior GVR in this case implies that petitioners' federal claims were properly preserved.

2. Respondents are also wrong in arguing that the court of appeals correctly applied *BMW*'s guidepost framework. At the outset, respondents miss the mark when they argue (at 19) that the court of appeals, far from criticizing this Court's punitive damages jurisprudence, merely quoted sources as part of a "balanced, scholarly analysis." Only a blindly partisan advocate could mistake the court of appeals' discussion for a "balanced, scholarly analysis." The court of appeals barely concealed its disdain for this Court's punitive damages case law, and refused to apply *Cooper* as a matter of state law. Besides, the court of appeals did not quote anyone when it accused this Court of "br[eaking] with common law tradition" and "avoid[ing] the application of the Seventh Amendment." Pet. App. 7a.[5]

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[5] Respondents likewise miss the point when they argue (at 2-3) that this case is not a dispute between local and out-of-state interests. Time Warner is a New York company, and respondents at trial described it as such. *See, e.g.*, 11/17/98 Tr. 44 ("decisions about the Georgia park" were made "at Rockefeller Center in Manhattan by Time Warner, Inc."). Meanwhile, the limited-partner respondent is a Georgia entity. Moreover, the lawyers who, if victorious here, might pocket hundreds of millions of dollars are members of the Georgia plaintiffs' bar.

Respondents' suggestion (at 2) that petitioners voluntarily selected the Georgia state court venue is also meritless. Petitioners brought a declaratory judgment action because litigation was inevitable: respondents had threatened to sue and had expressly retained a right to

As for the application of *BMW*'s first guidepost, respondents' answer to the central question in this case — what might petitioners have done that was so reprehensible as to warrant a quarter-billion-dollar fine? — is thoroughly underwhelming. Based on the amount of punitive damages involved, one might think that petitioners knowingly sold tainted penicillin that killed defenseless children or perhaps profited from a foreign regime's enslavement of innocent civilians. But respondents do not accuse petitioners of any such conduct. Instead, petitioners' evil is said to consist of this: "At the heart of Petitioners' scheme was a plan to depress 'the value of the park by under-investing in it and then withholding information so that [petitioners] could acquire the park at a discount' once the partnership agreement between Petitioners and Respondents ended in 1997." Br. in Opp. 5 (quoting Pet. App. 33a).

That this is the linchpin of respondents' case is remarkable for two reasons. *First*, even if one accepts respondents' statement at face value, petitioners' conduct is not remotely on a par with the conduct that one might expect judging from the size of the punitive award. No matter how many times respondents repeat it, "a callous indifference to the financial well-being" of respondents — "sophisticated business people" (Pet. App. 12a-13a) who, advised by the finest lawyers and investment bankers, earned more than a 100-fold return on a tax shelter that they themselves structured — is nowhere near the far end of the reprehensibility spectrum.

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do so in the new partnership agreement. Because complete diversity was lacking (the general partner being headquartered in Georgia), petitioners could not have sued in federal court. And it is doubtful that petitioners could have obtained *in personam* jurisdiction over respondents in any State other than Georgia.

Second, the theory that petitioners tried to reduce the park's purchase price by depressing earnings (through insufficient capital investment) cannot be accurate: it does not make logical sense. If indeed petitioners failed to install enough thrill rides in the Georgia park, this would have been plain for the world to see. Accordingly, no rational bidder would have thought that the park's historical earnings expressed the park's true potential, and, thus, no rational bidder would have appraised the park's value on the basis of the twelve-times-last-year's-earnings rule of thumb. *See* Pet. 20 & n.15. The proof of the pudding is in the eating: respondents cannot explain how a $9 million investment could add $150 million to the park's value overnight.[6] Thus, the theory is simply irrational; petitioners might as well have been punished for practicing witchcraft.

Assuming that petitioners in fact invested less than they should have, their conduct was motivated not by some devilishly clever scheme to acquire the park at a discount but by a simple attempt at self-protection. Under the agreement, respondents would gain title to all park property at the end of the partnership term in 1997. This encouraged respondents to make increasingly greedy demands for capital investment as the end of the term crept closer. Understandably, petitioners were reluctant to meet demands for major investment in new rides that would become the property of respondents only one or two years later.[7] Whatever one might think about that reluctance, the ultimate in reprehensibility it is not.

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[6] The closest respondents come to an explanation is by saying (at 7) that their damages multiplier theory was "explained repeatedly at trial, through several expert witnesses." But illogic does not change into logic when it is intoned by a paid "expert."

[7] Respondents correctly point out (at 5-6 n.4) that the funds that petitioners were supposedly required to invest would have come not

Respondents' other assertions of reprehensible conduct add nothing. Contrary to respondents' suggestions (at 26-27 n.16) and the court of appeals' misapprehensions (Pet. App. 13a, 24a), petitioners did not *steal* anything. Respondents received their full share of the so-called Coca-Cola money — it was merely the timing of the transfer to which they objected.[8] Likewise, the $4 million in overhead allocated from Six Flags' national headquarters and the $1.4 million in supposed overcharges for the Viper ride involved accounting and valuation issues as to which reasonable persons could plainly differ. *See* 12/7/98 Tr. 95-110, 122-35.

Respondents' brief also distorts the record where it portrays (at 22) petitioners as admitting that they were subject to a legal "duty to maximize the performance" of the park. Respondents base their argument on the testimony of an executive who, in response to the question whether "you and others at Time Warner realized and acknowledged that you had a duty to maximize the financial performance of the partnership parks," stated: "I always recognize that you have, you should maximize the return of a partnership park or any park." 11/17/98 Tr. 246. The witness thus testified only to a belief that it is

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directly out of petitioners' own pockets but, rather, out of the park's retained earnings. Be that as it may, under the partnership agreement, petitioners received 70% of any additional retained earnings, and respondents only 30%. Thus, funds invested in rides would otherwise disproportionately have wound up in petitioners' pockets. Indeed, if this were otherwise, it is hard to see how respondents could logically accuse petitioners of acting out of greed.

[8] Coca-Cola paid petitioners $20 million for a ten-year nationwide sponsorship arrangement, but the payment was contingent on the seven Six Flags parks' meeting attendance targets. As those targets were being met, the Georgia park received its 1/7 share of the $2 million annual amount, or about $285,000 per year. *See* 12/7/98 Tr. 135-39.

generally good business practice to maximize profits — not that the partnership agreement authorized a jury to substitute its views for petitioners' business judgments.

In connection with *BMW*'s second guidepost, respondents suggest (at 24) that, because petitioners have paid the compensatory award, this Court must accept that award as a realistic measure of the harm inflicted. They are wrong: "[t]he ratio should not be determined by measuring the punitive damages award against the unproved compensatory damages awarded by the same 'runaway' jury that rendered the punitive damages verdict but against the actual damages proven by the evidence." *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 513 (Ky. 2002) (Cooper, J., dissenting), *petition for cert. filed*, 71 U.S.L.W. 3519 (Jan. 21, 2003) (No. 02-1096); *see also Cooper*, 532 U.S. at 442 ("unrealistic" compensatory damages cannot support punitive award).

As for *BMW*'s third guidepost, respondents hardly even address the court of appeals' most glaring error: its reliance on statutes punishing conduct (like state RICO and securities fraud) vastly dissimilar to petitioners' — on the theory that those statutes likewise addressed "generally corrupt corporate behavior." Pet. App. 15a. That holding destroys *BMW*'s third guidepost as a meaningful restraint. *See* Pet. 21. Yet, in its defense, respondents argue (at 26 n.16) that "Petitioners' argument . . . would turn this Court into an arbiter of what is 'comparable' under state law." But this Court has already held that, if this is a concern at all, it "does not justify an abdication of [its] responsibility to enforce constitutional protections in an extraordinary case such as this one." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586 n.41 (1996).

The Petition also showed (at 23-24) that the court of appeals independently erred when, because Georgia has no

statutes carrying quarter-billion-dollar fines, it conducted its third-guidepost inquiry by reference to statutes threatening not fixed amounts but treble damages. Respondents answer (at 24-25) by wrongly suggesting that courts do so *routinely*. Although the error of the court below admittedly is not unprecedented, *see* Pet. 23 n.20, the decisions respondents cite (at 25) — to the extent they are even good law[9] — appear to have relied on treble damages statutes only for purposes of *BMW*'s *second* guidepost (as *BMW* did itself, *see* 517 U.S. at 580). Respondents are also wrong in saying (at 26-27) that, "if treble damages statutes did not provide constitutionally sufficient notice of liability up to three times the actual damages, then all treble damages statutes would be unconstitutional." Even assuming that awards under statutes allowing for treble damages are subject to *de novo BMW* review (*but see Cooper*, 532 U.S. at 440 n.13), our argument implies only that the inquiry under the third *BMW* guidepost should direct itself to statutes threatening penalties in fixed amount.[10]

The Petition further showed (at 24-25) that the court of appeals erred when, in conflict with other courts, it refused to make a comparison to punitive awards in other cases. Respondents (at 28 & n.18) now raise their assault on *BMW*'s third guidepost to a fever pitch: they say that "such a review would not have assisted Petitioners" in any event because "[t]he Georgia Courts have repeatedly affirmed

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[9] Although respondents do not identify them as such, one of their citations is to a case antedating *BMW* (*AIC*), one is to a dissent (*St. John*), and one is to a decision that was reversed on appeal (*Pioneer*).

[10] At a minimum, whether respondents are correct in their apparent argument that punitive awards up to three times compensatory damages can *never* offend due process constitutes an important question of federal law that should be settled by this Court.

punitive damages awards in breach of fiduciary duty cases with a much higher ratio to the compensatory award than the 1.3 to 1 ratio here." But the third guidepost deals not in relative ratios but in absolute amounts: it calls for an inquiry into "maximum civil penalt[ies]" to help assess whether "a more modest sanction" would have been "sufficient to motivate full compliance" with the law. *BMW*, 517 U.S. at 584-85. Plainly, a fine much smaller than $257 million would have amply sufficed to deter any possible "future misconduct." *Id.* at 584.

3. Respondents' only answer (at 29) to petitioners' request that the Court hold this case for *State Farm* is that the "focal point" of that case is an extraterritoriality issue that is not presented here. Even if that statement were accurate (which it is not), it would not undermine the need for a hold. A GVR is warranted whenever there is a "reasonable probability" that an intervening decision will provide additional guidance, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) — a standard that is amply satisfied even if application of the *BMW* guideposts turns out not to be *State Farm*'s "focal point."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 02-978

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of The State Of Georgia

SUPPLEMENTAL BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Six Flags Over Georgia, LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee of Six Flags Claims Trust, state the following:

Respondent Six Flags Fund, Ltd. (L.P.) owns 99% of the membership interests in respondent Six Flags Over Georgia, LLC ("Flags"). No publicly held company directly owns 10% or more of the membership interests in Flags.

Respondent Six Flags Fund, Ltd. (L.P.) ("Fund") is a limited partnership. Its managing general partner is the Salkin Family Trust, created by declaration of trust dated May 15, 1980, Avram Salkin and Dorothy Salkin, co-trustees. The only corporate general partner of Fund is SFG, Inc., a California corporation, which is the non-managing general partner and owns a 0.1% partnership interest in Fund. SFOG Acquisition A, Inc. owns a 17.1% special limited partnership interest in Fund, and SFOG Acquisition B, L.L.C. owns an 8.2% special limited partnership interest in Fund. Upon information and belief, Six Flags, Inc. (formerly known as Premier Parks Inc.) and AOL Time Warner Inc. may directly or indirectly own some or all of SFOG Acquisition A, Inc. and SFOG Acquisition B, L.L.C. AOL Time Warner Inc. and Six Flags, Inc. are publicly held.

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On Petition For A Writ Of Certiorari
To The Court Of Appeals Of The State Of Georgia

SUPPLEMENTAL BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

Respondents Six Flags Over Georgia, LLC ("Flags"), Six Flags Fund, Ltd. (L.P.) ("Fund"), and George DeRoy, as Trustee of Six Flags Claim Trust, respectfully submit this supplemental brief in opposition to the petition for a writ of certiorari pursuant to Rule 15.8 to address the Court's recent decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, Docket No. 01-1289 (*"Campbell"*).

INTRODUCTION

The verdict in this case was rendered in 1998. After affirmance by the Georgia appellate courts, Petitioners sought certiorari from this Court and, alternatively, a GVR in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). On October 1, 2001, this Court granted a GVR in light of *Cooper*. Pet. App. 59a.

On remand, the Georgia Court of Appeals asked for re-briefing and re-argument. On March 29, 2002, the whole (ten judge) Court of Appeals unanimously affirmed the award of punitive damages. The Court held that Petitioners had abandoned any alleged federal constitutional challenges under well-established Georgia law and procedural rules. Nevertheless, the Court of Appeals also conducted a thorough *de novo* review under *BMW v. Gore* and, alternatively, properly affirmed the punitive damages award of only 1.3 times the compensatory award in this intentional tort case in which (a) the jury expressly found that the Petitioners acted with specific intent to cause harm (Pet. App. 22a, n.3), and (b) the Court of Appeals held in a *de novo* consideration of the evidence that the Petitioners' deliberate breaches of fiduciary duty were "especially reprehensible." Pet. App. 12a.

In their current petition, even before *Campbell* was decided, Petitioners requested *another* GVR. Now that *Campbell* has been decided, this request for another GVR is demonstrably meritless. The facts, 1.3 to 1 ratio, and procedural posture below are entirely distinct from those at issue in *Campbell.* More importantly, the holdings and findings by the Court of Appeals here are totally consistent with the holdings of *Campbell.* Thus, *Campbell* has no effect on the Georgia court's affirmance of the punitive damage award below.

First, the Georgia Court of Appeals has held in this case that ***all*** federal constitutional challenges were abandoned under the applicable Georgia procedural rule, which is almost identical to its federal counterpart. Compare Georgia Court of Appeals Rule 27(c) to FRAP 28(a)(9). Resp. App. 2a-4a. *Second*, the extraterritoriality arguments that dominate *Campbell* are not remotely at issue here, as Petitioners admitted, first, by not raising the issue below, and

second by direct admission before this Court.[1] *Third*, unlike *Campbell*, the actual damages awarded in this case did not contain any "punitive element," such as a large award for "emotional distress," that was "duplicated in the punitive award." *Campbell*, Slip Op. at 16. *Fourth*, the Georgia Court of Appeals has already conducted a thorough *de novo* review and, alternatively, affirmed the 1.3 to 1 award at issue here "based on the facts and circumstances of the defendant[s'] conduct and the ***harm to the plaintiff***[s]." *Campbell*, Slip Op. at 15 (emphasis added). There is no purpose but delay to be served by a GVR to consider issues that have been waived, are not in the case at all, and have already been correctly considered.

JURISDICTION

As discussed fully in the reasons for denying the writ, this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the federal questions Petitioners now raise were not presented to or decided by the Court of Appeals in the first instance, and were waived and abandoned under state law, as the Georgia Courts expressly held.

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[1] Petitioners concede that *Campbell* is different from this case because *Campbell* "also presents an 'extraterritoriality' issue," Pet. 25, which is absent from this case. The extraterritoriality issue before the Court in *Campbell* could not possibly exist here because the jury in this case was expressly instructed *not* to consider extraterritorial conduct in setting the amount of punitive damages. Resp. App. 33a. The petitioners here were clearly "punished for the conduct that harmed the plaintiff, not for being an unsavory . . . business." *Campbell*, Slip Op. at 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of federal and Georgia statutes, and of the Georgia Constitution, are reproduced at Resp. App., 1a-12a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS ABANDONED THEIR FEDERAL CONSTITUTIONAL ARGUMENTS

Petitioners request a GVR in light of *State Farm Mutual Automobile Ins. Co. v. Campbell,* Docket No. 01-1289 (*"Campbell")* in which an opinion was issued on April 7, 2003. There is no basis for another GVR in this case.

The Georgia Court of Appeals' holding that the Petitioners did not preserve, but instead waived, all their federal constitutional challenges under Georgia law is dispositive and deprives this Court of jurisdiction to consider this petition. *See* Resp. 13-21.

> [T]his Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground, as it will if the state court's opinion "indicates clearly and expressly" that the state ground is an alternative holding.
>
> * * *
>
> It is difficult to comprehend why the State Supreme Court's statement that "the claim was not preserved for appeal" would not amount to "a plain statement that petitioner's claim was procedurally barred," especially since there is no reason to believe that error of the kind [Petitioner] alleged cannot be waived under Florida law. It is even more difficult

> to comprehend why the fact that the State Supreme Court rested upon this state ground merely in the alternative would somehow save our jurisdiction.
>
> * * *
>
> Finally, [the dissent's] suggestion that the State waived its independent-state-ground defense, forgets that this defense goes to our jurisdiction and therefore cannot be waived.

Sochor v. Florida, 504 U.S. 527, 533 & 534-35 n.* (1992) (citations omitted).

The Georgia Court of Appeals' finding of waiver could not be clearer.

> In their enumerations of error, appellants failed to assert that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Instead, they simply asserted the award was "excessive." In two sentences at the very end of their appellate brief, however, appellants noted that "punitive damages also violates the Due Process Clauses of the Georgia and United States Constitutions," citing *Gore*. Appellants did not argue that the award was "grossly excessive"; rather, it alleged the appellees' injury was "purely economic in nature" and "evinced no indifference to or reckless disregard for the health and safety of others." Pretermitting whether this adequately enumerated an "excessiveness" claim under the federal due process clause, we considered the claim of error abandoned because appellants failed to cite to any relevant facts, give record citations, or present any legal analysis supporting that assertion. Court of Appeals Rule 27(c)(2), (3). An assertion of error followed by a case citation is *not* legal argument. As we have explained, legal analysis "is,

> at a minimum, a discussion of the appropriate law as applied to the relevant facts." *Dixon v. Metropolitan Atlanta Rapid Transit Auth.*, 242 Ga. App. 262, 266(4) (529 SE2d 398) (2000).

Pet. App. 11a-12a.

This finding of waiver is not only compelled by the Petitioners' failures to enumerate as error, argue or even mention the *BMW v. Gore* guideposts they now hope to resurrect, but by Petitioners' affirmatively telling the Georgia Court of Appeals – in the first instance – that it should consider the legality of the punitive damages at issue solely under a state law "abuse of discretion" standard.[2] Instead of seeking a *de novo* review of the *BMW v. Gore* guideposts (or even mentioning them), Petitioners expressly invoked the Georgia **state law standard** applicable to state common-law excessiveness considerations. *See* Pet. App. 6a-8a. Petitioners invoked the applicable **Georgia state law** standard because ***state law excessiveness issues*** were all they competently raised and preserved, as the Georgia Court of Appeals correctly held on remand. Pet. App. 11a-12a.

In their Reply Brief, the Petitioners assert that the two pages of "argument" which preceded their rote recitation of *Gore v. BMW* in their original appeal brief supposedly included federal constitutional arguments. (Reply 2). Those arguments, however, (Pet. App. 68a-70a), inform the Court of absolutely nothing relevant to *BMW v. Gore* and, in

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[2] In their original brief to the Court of Appeals, Petitioners alleged that "[t]he trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive" (Resp. Supp. App. 2a), but, under the heading "standard of Review," Petitioners then told the appellate court: "This Court reviews for *abuse of discretion* rulings. . . for excessive damages, *Lisle v. Willis*, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995)." Resp. Supp. App. 3a (emphasis added). Petitioners did not further discuss the standard of review in their briefs to the Court of Appeals.

particular, to its three guideposts. Specifically, in that portion of their brief, Petitioners invited the Court of Appeals to reverse the punitive award because of (a) the state law ***evidentiary*** requirements of O.C.G.A. § 51-12-5.1 requiring "clear and convincing evidence" of misconduct, (b) the trial court's supposed failure to instruct the jury ***twice*** with respect to O.C.G.A. § 51-12-5.1(b)'s state law requirements and (c) the punitive damage award being supposedly "excessive" under Georgia statutory law, citing O.C.G.A. § 51-12-12 and the state law product liability case of *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984). Pet. App. 68a-70a. To the extent raising these state law matters arguably preserved ***any*** issue, the concerns voiced certainly had nothing to do with the extraterritoriality and proportionality issues addressed by *Campbell*. Indeed, they had nothing to do with federal law at all. In any event, every relevant *BMW v. Gore* federal criteria was subsequently fully considered *de novo* by the Georgia Court of Appeals on remand and decided against the Petitioners. Pet. App. 12a-16a.

The Georgia Court of Appeals' decision that Petitioners waived their federal constitutional claims is a jurisdictional bar to this Court considering such claims.

II. THE GEORGIA COURT'S *DE NOVO* REVIEW WAS CONSISTENT WITH *CAMPBELL'S* HOLDING.

Even though the Petitioners clearly abandoned their federal constitutional challenges, the Georgia Court of Appeals went on to expressly consider them and to do exactly what this Court has outlined in *Leatherman* and *Campbell* should be done in such a *de novo* review.

> ...[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the

general damages recovered. *Campbell*, Slip Op. at 15.

The Georgia Court of Appeals undertook such analysis and held that the punitive award was appropriate. The punitive damage award is well within the "single-digit" ratio *Campbell* held to be presumptively valid. *Id.* Indeed, at 1.3 to 1, the award even fits the *Campbell* opinion's observation that "substantial" awards of compensatory damages might support a lesser ratio. *Id.*[3] Certainly, 1.3 to 1 is not "grossly excessive," which is what the Georgia Court has ***already*** alternatively held here. Pet. App. 9a, 12a-16a.

The propriety of the 1.3 to 1 award here is conclusively established by the Georgia Court of Appeals finding under *BMW v. Gore's* third guidepost that the most analogous Georgia civil penalties for comparable misconduct are Georgia treble damage statutes applicable to intentional business misconduct. Pet. App. 15a and n. 10. [4] *See Campbell*, Slip Op. at 14-15. 1.3 to 1 is obviously at the lowest end of that range.

Under these circumstances, yet another GVR in this five year-old appeal is inappropriate.

CONCLUSION

The petition and the embedded request for a GVR in light of *Campbell*, should be denied.

Respectfully submitted.

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[3] Even then, *Campbell* eschewed any "rigid benchmarks." "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." Slip Op. at 14-15.

[4] Although the Court cites O.C.G.A. § 10-1-763(b) as providing for "double damages," it actually provides for exemplary damages of up to twice any actual damage award in addition to actual damages, *i.e.* treble damages.

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April 10, 2003.

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RESPONDENTS' SUPPLEMENTAL APPENDIX

APPENDIX A

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., and SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

BRIEF OF APPELLANTS

[September 20, 1999]

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* * *

[Page 15, Summary of Argument]

Seventh, the court erred by not setting aside the $257,000,000 punitive damages award. The evidence here, involving a purely commercial dispute, fell far short of that required to impose such damages. (See enumeration of error 12.) Moreover, all punitive damages above $250,000 must be remitted because the court failed to instruct the jury on the clear-and-convincing burden of proof on the special finding of specific intent to harm. (See enumeration of error 13.) And lastly, the unprecedented amount awarded is excessive under both statutory and constitutional standards. (See enumeration of error 14.)

* * *

[Page 17, Enumeration of Errors]

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

PART THREE

Standard of Review

This Court reviews de novo rulings on questions of law. Bumgarner v. Green, 177 Ga. App. 156, 158-60, 489 S.E.2d 43, 46-47 (1997). Improper jury charges and comments on witness credibility require a new trial if

harmful. Bennett v. Bagwell & Stewart, Inc., 216 Ga. 290, 297-98, 116 S.E.2d 288, 293 (1960); Speagle v. Nationwide Mut. Fire Ins. Co., 138 Ga. App. 384, 385, 226 S.E.2d 459, 460 (1976). Denial of directed verdict and JNOV motions must be reversed if the evidence does not support the verdict. Tate v. Holloway, 231 Ga. App. 831, 833, 499 S.E.2d 72, 74 (1998). This Court reviews for abuse of discretion rulings to admit or exclude evidence, Andrews v. Wilbanks, 265 Ga. 555, 556, 458 S.E.2d 817, 818 (1995), on discovery sanctions, Harwood v. Great Am. Management & Inv., Inc., 171 Ga. App. 488, 491, 320 S.E.2d 269, 272 (1984), and for excessive damages, Lisle v. Willis, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995).

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(6)

Supreme Court, U.S.
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No. 02-978

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Under the pretense of addressing this Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, respondents have filed a supplemental brief. The lion's share of that brief has nothing to do with *State Farm* but instead merely repeats a meritless argument already contained in respondents' brief in opposition: that petitioners failed to preserve their claim that the $257 million punitive damages award in this case violates due process. Insofar as the supplemental brief *does* address *State Farm*, it grossly misconceives the decision's implications for this case. In this short response, we briefly explain why, at a minimum, a GVR in light of *State Farm* is required.

1. This Court's Rule 15.8 states that, although parties may file a supplemental brief "calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing," the brief "shall be restricted to new matter." Respondents' argument that petitioners failed to preserve their due process claims is in no way affected by the Court's decision in *State Farm*. Respondents' supplemental brief simply repeats and seeks to bolster arguments that respondents previously made or could have made. Worse, respondents' brief expressly refers to and purports to rebut arguments made in petitioners' reply brief. *See* Supp'l Br. 6-7. This Court's rules do not permit surreplies, and respondents should not be permitted to profit from filing one.

Besides, respondents' waiver argument is without any merit. Respondents' claim — that, supposedly because "Petitioners waived their federal constitutional claim," there "is a jurisdictional bar to this Court considering such claims," *id.* at 7 — has now been rejected *twice*: once when Justice Kennedy granted a stay, *see* Pet. App. 58a,

and once when the Court GVR'd in light of *Cooper*, *see id.* at 59a. We have already extensively explained why those two decisions were correct. *See* Pet. 13-17; Reply Br. 1-4; Reply Br. in No. 00-1875, at 7-10. There is no need to repeat that explanation here.

2. Respondents' suggestion (at 2) that *State Farm* "has no effect on the Georgia court's affirmance of the punitive damages award below" is transparently mistaken. At a minimum, *State Farm* establishes that, when there is a "substantial compensatory" award of which "a portion . . . contained a punitive element," a punitive award "at or near the amount of compensatory damages" is the constitutional maximum. *Id.* at 18; *see also id.* at 15 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."). The implications for this case are obvious: here, there is a compensatory damages award of $197 million (almost 200 times the "substantial" award in *State Farm*), the overwhelming majority of which "contained a punitive element," *see* Pet. 19-20; Reply Br. 6. Moreover, there is a punitive damages award of $257 million, almost twice as large as the punitive award in *State Farm*, and well in excess of the substantial compensatory award here.

While *State Farm*'s core holding thus establishes that, at a minimum, the outsized award here cannot stand, the balance of the Court's opinion makes clear just how far the award must be reduced (assuming punitive damages are permitted at all). *First*, the Court established that, to justify punitive damages, at least one of five factors must exist: physical harm, indifference to health or safety, a financially vulnerable victim, repeat conduct, or "intentional malice, trickery, or deceit" — and further held that even the "existence of any one of these factors . . . may not be sufficient." Slip op. 8. By that measure, the case for *any*

punitive award here is feeble to non-existent. *See* Pet. 17-19. The factor on which the Court of Appeals relied — petitioners' supposed "callous indifference to the financial well-being of [the] limited partners," Pet. App. 12a-13a — is simply insubstantial.

Second, besides establishing that a large compensatory award limits the amount of permissible punitive damages (particularly when the compensatory award "contained a punitive element"), *see* slip op. 15, 18, the Court established that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," *id.* at 17. That recognition is flatly at odds with the decision of the Georgia Court of Appeals, which found it quite significant that petitioners were "corporate entities with collective assets measured in billions of dollars." Pet. App. 15a.

Third, the Court made clear that, for third-guidepost purposes, it will not do to rely on criminal and civil penalties applicable to "dissimilar conduct." *See* slip op. 18. It will be recalled that the Georgia Court of Appeals found a supposed breach of fiduciary duty similar to conduct made unlawful by the state RICO statute on the theory that both involved "generally corrupt corporate behavior." Pet. App. 15a. Moreover, by indicating that even a 1:1 ratio can be too high, this Court flatly rejected the Georgia Court of Appeals' mistaken notion that constitutionally required notice of punitive liability exists whenever treble-damages statutes lurk in the wings. *See* Pet. 23-24.

3. Respondents are thus simply wrong to contest *State Farm*'s significance. At a minimum, this Court should GVR to give the Georgia courts an opportunity in the first instance to address the implications of *State Farm* for the punitive damages award in this case. A GVR may well be enough to set the Georgia courts on the right path: under

the circumstances, a second GVR should cause any state court to realize that the outsized verdict in this case must be drastically reduced. *Cf. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (GVR can "serv[e] as a cautious and deferential alternative to summary reversal").

But respondents' supplemental brief suggests that, on remand, they will again argue that the Georgia courts should defy the clear import of this Court's precedents. Regrettably, the history of this case shows that the Georgia courts have been receptive to such arguments. Thus, it cannot be ruled out that respondents' prediction that "[t]here is no purpose but delay to be served by a GVR," Supp'l Br. 3, will become reality. If anything, then, respondents' supplemental brief reinforces the case for this Court's going beyond a GVR and entering an order providing a clear indication (unmistakable even to the Georgia Court of Appeals) that the award in this case cannot survive *State Farm*. *See* Pet. 21-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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